(28,415)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 460.

THE CITY OF BOSTON, PLAINTIFF IN ERROR,

vs.

JAMES JACKSON, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; JAMES F. JACKSON, SAMUEL L. POWERS, ET AL., TRUSTEES, &c., ET AL.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1921.

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this — day of —— in the year one thousand nine hundred and twenty one.

[SEAL.] ARTHUR P. RUGG.

b (D. C. Form 415.)

UNITED STATES OF AMERICA, *ss:*

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between the City of Boston, a municipal corporation, of the Commonwealth of Massachusetts, Plaintiff, and James Jackson, Treasurer & Receiver General of the Commonwealth of Massachusetts, and James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens, and Winthrop Coffin as they are Trustees of the Boston Elevated Railway Company, and Boston Elevated Railway Company, Defendants, in a Bill of Complaint wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a mani-

fest error hath happened, to the great damage of the said City of Boston, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within twenty-eight days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the fifteenth day of July in the year of our Lord one thousand nine hundred and twenty one.

JOHN E. GILMAN, JR.,
Deputy Clerk of the District Court of the United States, District of Massachusetts.

July 15, 1921.

Allowed by
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of Massachusetts.

c [Endorsed:] Writ of Error to State Court. Suffolk, ss. Supreme Judicial Court. Filed Jul. 15, 1921. John F. Cronin, Clerk.

COMMONWEALTH OF MASSACHUSETTS, *ss:*

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court *Court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I —— ——, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this twenty second day of July, A. D. 1921.

JOHN F. CRONIN,
Clerk.

d COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Equity from the first day of January in the year of our Lord one

thousand nine hundred and nineteen to the first day of July nineteen hundred and twenty-one, both days inclusive, it is thus contained:—the following being the entire record in the case:

1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

No. 31599. Eq.

CITY OF BOSTON

v.

CHARLES L. BURRILL, Treasurer and Receiver-General of the Commonwealth of Massachusetts, and James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens, and Winthrop Coffin, as They are Trustees of the Boston Elevated Railway Company, Duly Appointed under the Provisions of c. 159 of the Special Acts of 1918, and Boston Elevated Railway Company.

Report.

This case came on for hearing upon the substitute bill of complaint filed by the plaintiff July 29, 1919, as amended, and upon the demurrers of the defendants thereto.

I overruled the demurrers. I am of opinion that the order overruling the demurrers so affect the merits of the controversy that the correctness of that order should be determined by the full court before further proceedings are had in the cause, and therefore report the question of the correctness of that order for the determination of the full court.

WILLIAM CALEB LORING,
Justice Sup. Jud. Ct.

Sept. 12, 1919.

[Endorsed:] No. 31599. Supreme Judicial Court. Suffolk, ss. City of Boston v. Burrill et al. Report.

2 *Substitute Bill of Complaint.*

And now comes the plaintiff in the above entitled cause and asks leave of court to substitute the following bill of complaint in lieu of the substitute bill of complaint filed on July 22, 1919, and in lieu of the original bill as amended theretofore filed.

The City of Boston, a municipal corporation, on information and belief, respectfully represents and avers:

1. That the Boston Elevated Railway Company, hereinafter called the Company, is now being managed and operated by a Board of Trustees consisting of James F. Jackson, Chairman, Samuel L. Powers, Stanley R. Miller, John F. Stevens, and Winthrop Coffin,

duly appointed under the provisions of C. 159 of the Special Acts of 1918.

2. That under the provisions of said act the Commonwealth of Massachusetts is obliged to pay to said Company the amount of the deficiency as ascertained under the provisions of said act between the cost of service and the revenue of the Company.

3. That under the provisions of sec. 11 of said act the trustees have notified the Treasurer and Receiver General of the Commonwealth that the deficiency which the Commonwealth was obliged to pay at this time amounts to nearly four million dollars, the exact amount being to your petitioner unknown, and the Treasurer and Receiver General proposes to pay to the Company sum of nearly four million dollars on July 18, 1919; and that the said sum of four million dollars includes the rents paid by the trustees to the city for the use of the subways and tunnels hereinafter re-
3 ferred to under the leases and contracts hereinafter referred to.

4. That in the cost of service provided for under the provisions of said act the trustees have charged for depreciation for the fiscal year ending June 30, 1919, the sum of approximately two million dollars, and have charged for maintenance and repairs approximately the sum of two million three hundred thousand dollars, the exact amounts of each amounts of each of said charges being to your petitioner unknown.

5. That prior to the management and operation of the Company by the trustees the average amount charged by the Company itself for depreciation during each of the 10 years prior to July 1, 1918, was about $98,000 and the amounts charged for maintenance and repairs in each of said years were far less than the amount which the trustees have charged as hereinbefore stated; that owing to adequate allowances for depreciation during the operation of the property of the Company under its own management for a long time prior to July 1, 1918, and owing to the fact that for a long time prior to July 1, 1918 the Company itself had failed to keep its property in proper operating condition and failed to use sufficient money for maintenance and repairs, the property at the time it came under the management of the trustees, viz., on July 1, 1918, was badly run down and depreciated, and owing to this condition the trustees felt it incumbent upon themselves in the performance of their duties to charge in one year the sums hereinbefore stated as charged for depreciation and for maintenance and repairs in order, in large part, at least to make up for the neglect of the Company in the past.

4 6. That your petitioner alleges that the amounts which the trustees have charged for depreciation and for maintenance and repairs are excessive, unreasonable, unnecessary and illegal, and that the cost of service which the truste-s have charged, including, as hereinbefore stated, the said items for depreciation and for main-

tenance and repairs is excessive, unreasonable, unnecessary and illegal, and that the deficiency of which the trustees have notified the Treasurer and Receiver-General is therefore excessive, unreasonable, unnecessary and illegal.

7. That under the provisions of said act any amounts which the Commonwealth pays to the Company to meet the deficiency shall be assessed upon the cities and towns in which the Company operates by an addition to the state tax next thereafter assessed in the proportion set forth in sec. 14 of said act, to be determined and reported in accordance with the provisions of said sec. 14.

8. That your petitioner is one of the cities and town in which the Company operates and under the provisions of said sec. 14 will be called upon to pay a very large percentage of any amount which the Commonwealth pays to the Company, and if the Commonwealth pays to the Company an amount in excess of what it legally and properly should pay, the assessment which will be made upon your petitioner will be illegal and excessive in proportion.

9. That by virtue of the provisions of sec. 19 of c. 534 of the Acts of 1902, it was expressly provided that if the said act
5 should be accepted by a majority of the voters of the City of Boston at the municipal election of 1902, it should thereupon take full effect; and that "the city shall have, hold and enjoy in its private or proprietary capacity for its own property the existing subway, the East Boston tunnel, the Cambridge street subway, and the tunnel and subway built under this act, and all rents, tolls, income and profits from all contracts heretofore or hereafter entered into for the use of said subways or tunnels or any part thereof, and the same shall never be taken by the Commonwealth except on payment of just compensation."

That after the passage of said act of 1902, the same was duly accepted by a majority of those voting at the municipal election held in the city of Boston on December 9, 1902.

That the "existing subway" referred to in said act of 1902 was the so-called Tremont Street subway built under c. 548 of the Acts of 1894; and that the "subway built under this act" referred to in said act of 1902 was the subway since constructed and known as the Washington street subway.

That by c. 741 of the Acts of 1911, the Boston Transit Commission was authorized to construct at the expense of the City of Boston certain additional tunnels or subways in said city in extension of the tunnels and subways referred to in said act of 1902, said additional subways and tunnels being commonly known as the Dorchester tunnel, the Boylston street subway, and the East Boston tunnel extension, provided the said act of 1911 should be accepted by the City of Boston; that said act of 1911 provided that
6 the City should have, hold and enjoy in its private or proprietary capacity for its own property the said Dorchester tunnel, the said Boylston street subway, and the said East Boston tunnel extension, and all rents, tolls, income and profits from all contracts entered into for the use thereof or any part thereof, and

that the same should never be taken by the Commonwealth except on payment of just compensation; and that said act was accepted by the City of Boston on or about September 21, 1911.

That all the subways and tunnels hereinbefore mentioned were duly constructed by the Boston Transit Commission at an expense to the City of Boston of about $36,000,000, of which sum about $31,000,000 was expended after the said acceptance of the said act of 1902, and that the leases or contracts relating to the use thereof were duly entered into between the City of Boston and the Boston Elevated Railway Company providing for the payment of fixed rents to the said City, said rents amounting to the sum of approximately $1,800,000 annually.

That by virtue of said acts, acceptances by the City, and contracts or leases the City is entitled to hold and enjoy in its private or proprietary capacity for its own property all the said subways and tunnels hereinbefore mentioned, and to receive the rents, tolls, income, and profits of all now existing leases or contracts entered into for the use of said subways or tunnels or any part thereof without interference by the Commonwealth except on payment of just compensation.

That all said leases or contracts between the City and the
7 Boston Elevated Railway Company provide that all repairs to the leased property shall be made at the sole expense of the Company, except such repairs as may be due to certain extraordinary causes specifically mentioned, and that the Company shall maintain the leased premises in good order and condition as complete structures adapted to the maintenance and use of lines of railway, and that all said leases or contracts include a right in the City of Boston to entry upon default in payment of rent. (All said leases or contracts for the use of the several subways and tunnels were extended until the first day of July, 1936, by virtue of the provisions of chapter 741 of the Acts of 1911.)

That the provisions of said Act of 1918 impair the rents due the City under said Acts of 1902 and 1911, and the leases and contracts hereinbefore referred to, and the rights of the City under said Acts, leases, and contracts, by providing for an assessment through taxation upon the City of a part of the rents and profits which the City is entitled to have outright and clear, by charging the City through such assessments with a part of the repairs which under the terms of said leases or contracts are to be made by the Company, by charging the City with the cost of making good the amount of money that should have been expended by the Company under said contracts and leases in order to maintain the leased premises in good order and condition as complete structures adapted to the mainteance and use of lines of railway, and by making no provision for compensation to the City for the aforesaid impairment of its rents, tolls, property, and contract rights.

That the provisions of said Act of 1918 are in violation of the terms of the contracts hereinbefore referred to entered into
8 between the Commonwealth and the City of Boston, and be-

tween the City and the Boston Elevated Railway Company respecting the property in said subway and tunnels, and the rents, income and profits thereof, and deprive the City of its property in violation of the provisions of Article XII of Part I of the constitution of the Commonwealth.

That the provisions of said act of 1918 are in violation of the provisions of sec. 10 of Article I of the constitution of the United States, which provisions prohibit any state from passing any law impairing the obligation of contracts.

That the provisions of said act of 1918 deprive the City of its property without due process of law, and deny to the City the equal protection of the laws, in violation of the Fourteenth Amendment to the constitution of the United States.

10. That said acts of 1902 and 1911 provide that the Supreme Judicial Court of the Commonwealth shall have jurisdiction to enforce or prevent violation of the respective provisions of said acts by any appropriate process upon application of the City of Boston.

11. That the delegation under sec. 6 of said c. 159 of full and complete authority to a board of trustees to determine at its absolute discretion and without limitation an allowance for depreciation of the property and for obsoles-ence and losses in respect to property sold, such allowance to be charged into the cost of the service and included in the deficit to be paid by the Commonwealth in the first instance, and thereafter to be apportioned to the plaintiff as
9 part of its state tax, was an arbitrary and unreasonable delegation of legislative authority and beyond the scope of the Legislature; that it deprives the City of Boston of its property without due process of law and denies to said City the equal protection of the laws in violation of the Fourteenth amendment to the constitution of the United States, and it deprives the said City of its property of violation of the provisions of Article XII of Part I of the constitution of the Commonwealth.

12. That at the time when said c. 159 was enacted the Boston Elevated Railway Company was encountering difficulties in regard to meeting its financial obligations and paying its current expenses; its credit was impaired, and it was unable to raise money by the issuance of bonds or stock or by borrowing in other ways; that it was not earning enough to pay its operating expenses and other charges; that it had already passed at least one dividend to its stockholders and was not earning sufficient money to pay dividends to its stockholders; that owing to the inadequacy of the amounts charged off to depreciation for some time prior to the passage of said act, and owing to the inadequacy of charges for maintenance and repairs, the property of said Company had become run down and depreciated in value; that it is doubtful whether at that time the actual value of the Company's assets was sufficient to pay its indebtedness, and whether there was any equity over and above the amount of its indebtedness for stockholders; that there was then no prospect that the Company

for an indefinite period could earn sufficient money to pay
10 dividends to its stockholders or earn sufficient to properly operate and maintain the property or to make any annual charges of any adequate amount for depreciation; that under the provisions of said act the trustees are permitted to include in the cost of service such allowances as they deem necessary or advisable for depreciation and for obsoles-ence and losses in respect to property sold, destroyed or abandoned, to pay fixed dividends on all preferred stock outstanding, and dividends on common stock from time to time outstanding at the rate of five per cent per annum, on its par value during the first two years, five and one-half per cent per annum during the next two years, and six per cent per annum during the balance of the period of public operation; and it was made the duty of the trustees to maintain the property in good operating condition and to make such provision for depreciation, obsoles-ence and rehabilitation that upon the expiration of the period of public management and operation the property should be in good operating condition.

That the financial condition and credit of the Company was such at the time when said c. 159 was passed that the Company was unable to satisfactorily operate its property and give service to the public, or to make any returns to its stockholders; that unless it had been aided by the Commonwealth, it would shortly have been obliged to ask for protection from a court, or its creditors would have been obliged to ask some court to protect their interests; that its condition was reflected in then market value of its stock; that said
11 c. 159, under the guise of protection for the public served by the Company, in reality and effect amounted to giving the credit of the Commonwealth in aid of a corporation privately owned and managed, and was in fact designed merely to provide a gratuity to the Company, its creditors and stockholders; that immediately after the passage of said c. 159 the market value of the stock of the Company very substantially increased, and has continued ever since at a figure far higher than it was before said act was passed.

The plaintiff alleges in view of the facts existing at the time of the passage of said c. 159, as hereinbefore stated, that the provisions of said act were unconscionable and unreasonable, in violation of Article LXII of the constitution of the Commonwealth, and in other respects unconstitutional, and in violation of the constitution of the Commonwealth and of the Constitution of the United States; that said act is an injury to the City of Boston and its taxpayers, and deprives the said City and its taxpayers of their property without due process of law and denies to said City, its taxpayers and other citizens the equal protection of the laws in violation of the Fourteenth Amendment to the constitution of the United States, and deprives the said City and its taxpayers of their property in violation of the provisions of Article XII of Part I of the constitution of the Commonwealth.

Wherefore your petitioner respectfully prays that an order of

notice be issued immediately to the defendants named herein,
12 and that an injunction be issued against the Treasurer and Receiver General restraining him from paying to the Company the amount which the trustees have notified him he is to pay and which he proposes to pay; that said c. 159 of the Special Acts of 1918 be declared unconstitutional and null and void; that the trustees of the Company be perpetually enjoined from determining the amount of the deficiency between income and cost of service as defined in said c. 159, and from notifying the Treasurer and Receiver General of the Commonwealth thereof; that the Treasurer and Receiver General of the Commonwealth be perpetually enjoined from assessing upon the plaintiff the whole or any part of any amount or amounts which the Commonwealth has paid or shall pay to the Company or from issuing any warrant in connection therewith or attempting to levy upon the plaintiff any tax for any part of such amount or amounts, and for such other and further relief as your Honorable Court may deem necessary or expedient in the premises.

CITY OF BOSTON,
By ALEXANDER WHITESIDE,
Corporation Counsel.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

July 29, 1919.

Then personally appeared Alexander Whiteside, Corporation Counsel of the City of Boston and made oath that the statements in the foregoing bill in equity contained are true on information and belief as stated therein. Before me,

SAMUEL SILVERMAN,
Justice of the Peace.

Filed July 29, 1919.

September 9, 1919.
Allowed as of July 29, 1919.
(LORING, *J.*)

13 *Demurrer of Treasurer and Receiver-General to Substitute Bill.*

And now comes Charles L. Burrill, as he is Treasurer and Receiver General of the Commonwealth, and demurs to the substitute bill of complaint in the above-entitled cause, upon the following grounds:

1. The complainant has no standing to bring a bill in equity against him on the grounds therein set forth.

2. Said bill cannot be maintained against this respondent in his capacity of Treasurer and Receiver-General of the Commonwealth.

3. Said bill sets forth no grounds for relief in equity against this respondent.

By His Attorney, WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

I hereby certify that this demurrer is not filed for purposes of delay.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

Filed August 1, 1919.

14 *Demurrer of James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens, and Winthrop Coffin, as They are Trustees of the Boston Elevated Railway Company.*

Now come the above named respondents and demur to the plaintiff's bill of complaint, and for causes of demurrer say:

1. That the bill sets out no cause of action against these respondents substantially in accord with the law and statutes of this Commonwealth.

2. That it appears on the face of the bill that these respondents are acting merely as agents and officers of this Commonwealth and this bill is in effect a proceeding against the Commonwealth in its own Courts in a manner and for a cause not permitted by its statutes.

3. That the bill in effect attempts to restrain these respondents as agents of the Commonwealth from exercising the discretionary powers conferred upon them by Section 14 of Chapter 159 of the Acts of 1918 to determine and report to the Treasurer and Receiver-General the amount to be assessed upon the City of Boston and this Court has no jurisdiction to entertain such a bill.

4. That the bill seeks to restrain the Treasurer and Receiver-General from paying over to these respondents monies which he is required by statute to pay, and this petitioner has no interest in such payment or any interest until the Commonwealth seeks to recover from the petitioner some portion of the sum so paid over.

15 5. That the petitioner is a municipal corporation of this Commonwealth and these respondents are now operating a great public utility lying partly within the boundaries of the petitioner under legislative authority and direction, and as such legislation is binding upon the petitioner, it has no standing in this Court to object to any burden imposed upon it by the Legislature.

6. That the bill seeks to raise questions of a purely administrative or discretionary nature, which have been delegated by the Legislature to these respondents, and of which this Court has no jurisdiction.

7. That the allegations in the sixth paragraph of the bill that the determination by these respondents as to proper charges for repairs, maintenance and depreciation is "excessive, unreasonable, unnecessary and illegal" state conclusions of law merely and no facts are stated upon which such conclusions can be properly founded.

8. That in so far as the bill complains of a failure by the respondent Boston Elevated Railway Company to comply with its obliga-

tions to the petitioner, the bill sets out no ground of relief therefor against these respondents, but the petitioner has a plain, adequate and complete remedy at law for breach of contract.

9. That in so far as the bill complains of the expenditures of these respondents for maintenance and repairs, such expenditures were placed by the Legislature within their discretion, and there is no allegation that they have not acted in good faith or otherwise than in accordance with the discretionary powers conferred upon them by Chapter 159 of the Acts of 1918.

10. That in so far as the bill complains of the amount charged by these respondents for depreciation there is no allegation that they have not acted in good faith or otherwise than in accordance with the discretionary powers conferred upon them by Chapter 159 of the Acts of 1918.

By Their Attorney, H. WARE BARNUM.

I, H. Ware Barnum, of counsel for the above named respondents, hereby certify that the foregoing demurrer is in my opinion well founded in law and is not filed for the purpose of delay.

H. WARE BARNUM.

[Endorsed:] (11.) Supreme Judicial Court. Equity. No. 31599. City of Boston v. Charles L. Burrill et al. Demurrer of defendant trustees. Suffolk ss. Supreme Judicial Court. Filed Sep. 2, 1919. John F. Cronin, Clerk.

Demurrer of the Boston Elevated Railway Company.

And now comes the Boston Elevated Railway Company and demurs to the bill for the reasons stated in the demurrer of the Trustees of the Boston Elevated Railway Company.

By Its Attorneys, H. WARE BARNUM.
CHARLES B. GLEASON.

I certify that the within demurrer is good in law and is not intended for delay.

CHARLES B. GLEASON,
Attorney for Boston Elevated Railway Co.

[Endorsed:] 31599. Eq. (12.) City of Boston vs. Treas. & Rec'r Gen. Demurrer of Boston Elevated Ry. Co. Filed by leave of Court Sept. 9, 1919. Attest: John F. Cronin, Clerk.

Interlocutory Decree Overruling Demurrers.

This case came on to be heard at this sitting upon the respondents' demurrers, and was argued by counsel; and thereupon, upon con-

sideration thereof, it is ordered, adjudged and decreed that said demurrers be, and the same hereby are, overruled.

By the Court,

JOHN F. CRONIN,
Clerk.

September 9, 1919.

(Loring, J.)

19 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Feb. 28, 1921.

In the case of

CITY OF BOSTON

vs.

TREASURER and RECEIVER GENERAL et als.

Pending in the Supreme Judicial Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,

Decree overruling demurrers reversed and decree to be entered sustaining demurrers for want of equity.

By the Court,

C. H. COOPER,
Clerk.

February 28, 1921.

19*a* *Brief Statement of the Grounds and Reasons of the Decision.*

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

19*b* [Endorsed:] 31599. Eq. (18.) No. 1331. Eq. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. City of Boston vs. Treasurer & Receiver General et als. Suffolk, ss. Supreme Judicial Court. Filed Mar. 3, 1921. John F. Cronin, Clerk.

20 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity.

No. 31599.

CITY OF BOSTON

vs.

TREASURER & RECEIVER-GENERAL et al.

Motion to Have Case Remain on the Docket.

Now comes James F. Jackson and others, trustees of the Boston Elevated Railway Company, respondents in the above entitled case, and move that the same be allowed to remain on the docket for the reason that the case has been pending before the Supreme Judicial Court for the Commonwealth upon report; that Rescript has recently been handed down therein and the cause should remain pending for the purpose of entry of final decree in accordance with such Rescript.

By Their Attorney, H. WARE BARNUM.

Affidavit in Support of Motion.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, March 25, 1921.

Then personally appeared H. Ware Barnum, Attorney for the above mentioned respondents in the above entitled case and made oath that the statements contained in the foregoing motion by him subscribed are true as stated therein.

Before me,

CURTIS H. WATERMAN,
Justice of the Peace.

[Endorsed:] Equity. 31599. (19.) Commonwealth of Massachusetts, Suffolk, ss. Supreme Judicial Ct. City of Boston vs. Treasurer & Receiver General et al. Motion to have case remain on the Docket. Suffolk, ss. Supreme Judicial Court. Filed Mar. 24, 1921. John F. Cronin, Clerk. Service of notice of the within Motion is hereby accepted. Arthur D. Hill, Corporation Counsel for the City of Boston. Alexander Lincoln, Assistant Attorney General. Gaston, Snow, Saltonstall & Hunt, Attorneys for Boston Elevated Railway Company.

21 April 5, 1921.—Case called in accordance with Order of Court of January 3, 1921 and case allowed to remain on the Docket, until further Order of Court.

22 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

No. 31599.

CITY OF BOSTON

v.

CHARLES L. BURRILL, Treasurer and Receiver General of the Commonwealth of Massachusetts, et als.

Demurrer of James Jackson, Treasurer and Receiver General, to Substitute Bill of Complaint as Amended.

Now comes James Jackson, as he is Treasurer and Receiver General of the Commonwealth, and demurs to the substitute bill of complaint, as amended, in the above entitled cause, upon the following grounds:

1. The plaintiff has no standing to bring a bill in equity against him on the grounds therein set forth.

2. Said bill cannot be maintained against this defendant in his capacity of Treasurer and Receiver General of the Commonwealth.

3. Said bill sets forth no grounds for relief in equity against this defendant.

By His Attorney, ALEXANDER LINCOLN,
Assistant Attorney General.

I hereby certify that this demurrer is not filed for purposes of delay.

ALEXANDER LINCOLN,
Assistant Attorney General.

SUFFOLK, *ss:*

Supreme Judicial Court.

Filed June 10, 1921.
JOHN F. CRONIN,
Clerk.

23 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

Equity. No. 31599.

CITY OF BOSTON

v.

TREASURER and RECEIVER-GENERAL et al.

Motion to Amend the Bill.

And now comes the plaintiff in the above-entitled case and in view of the representation made by the Attorney General that Charles L. Burrill, one of the defendants, has ceased to occupy the office of Treasurer and Receiver General of the Commonwealth, moves for leave of court to amend the bill herein by substituting James Jackson the present Treasurer and Receiver General of the Commonwealth for the said Burrill as one of the parties defendant.

THE CITY OF BOSTON,
By JOSEPH P. LYONS,
Asst. Corporation Counsel.

The within motion may be allowed,

H. WARE BARNUM.
GASTON, SNOW, SALTONSTALL & HUNT.
ALEXANDER LINCOLN,
Asst. Attorney-General.

Filed and allowed, June 11, 1921.

Attest:

JOHN F. CRONIN,
Clerk.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity.

#31599.

CITY OF BOSTON

v.

TREASURER and RECEIVER-GENERAL et al.

Stipulation Relative to Demurrers.

It is hereby stipulated between the City of Boston, James F. Jackson, et al. as they are trustees of the Boston Elevated Railway Company, duly appointed under the provisions of Chapter 159 of the Special Acts of 1918, and the Boston Elevated Railway Company that the demurrer of James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens and Winthrop Coffin, as they are trustees of the Boston Elevated Railway Company filed September 2, 1919, and the demurrer of the Boston Elevated Railway Company filed by leave of court September 9, 1919, be treated as demurrers to the substitute bill of complaint as amended filed September 9, 1919 and allowed by the court as of July 29, 1919, and as further amended by the plaintiff's motion to amend the bill allowed June 11, 1921.

CITY OF BOSTON,
By JOSEPH P. LYONS,
Acting Corporation Counsel.
JAMES F. JACKSON,
SAMUEL L. POWERS,
STANLEY R. MILLER,
JOHN F. STEVENS, AND
WINTHROP COFFIN,
As They Are Trustees of the Boston Elevated Railway Company Duly Appointed under the Provisions of Chapter 159 of the Special Acts of 1918,
By H. WARE BARNUM.
BOSTON ELEVATED RAILWAY COMPANY,
By GASTON, SNOW, SALTONSTALL & HUNT,
Its Attorneys.

SUFFOLK, *ss:*

Supreme Judicial Court.

Filed June 11, 1921.
JOHN F. CRONIN,
Clerk.

25 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

No. 31599.

CITY OF BOSTON
v.
TREASURER and RECEIVER-GENERAL et al.

Final Decree.

This cause came on to be heard after rescript, and after the filing and allowance of a motion to amend the substitute bill of complaint by substituting James Jackson, the present Treasurer and Receiver General of the Commonwealth, for the defendant Charles L. Burrill as one of the parties defendant, and after the filing of a demurrer by said James Jackson to said substitute bill of complaint, as thus amended, and thereupon, upon consideration thereof, and of the opinion of the Supreme Judicial Court for the Commonwealth handed down with said rescript, and of the statement of the plaintiff that it does not wish to amend the bill of complaint otherwise than by substituting, as aforesaid, James Jackson, the present Treasurer and Receiver General of the Commonwealth for Charles L. Burrill, one of the parties defendant, as authorized by said opinion, it is,

Ordered, adjudged and decreed that the demurrers of the several defendants to the bill of complaint, thus amended, be sustained for want of equity and the bill of complaint be and the same hereby is dismissed.

By the Court,

JOHN F. CRONIN,
Clerk.

June 11, 1921.

The within form of Final Decree is assented to
H. WARE BARNUM,
Atty. for James F. Jackson et al.
ALEXANDER LINCOLN,
Asst. Atty. Gen.
GASTON, SNOW, SALTONSTALL & HUNT,
For Boston El. Rwy. Co.

(Crosby, J.)
(June 11, 1921.)

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this fifteenth day of July in the year of our Lord one thousand nine hundred and twenty-one.

JOHN F. CRONIN,
Clerk.

[SEAL.]

COMMONWEALTH OF MASSACHUSETTS:

Boston, July 7, 1921.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of City of Boston vs. Treasurer & Receiver General et als. decided on the 28th day of February, 1921.

ETHELBERT V. GRABILL,
Reporter of Decisions.

ETHELBERT V. GRABILL.

RUGG, *C. J.*:

This is a suit in equity by the city of Boston against the Treasurer and Receiver General, the Boston Elevated Railway Company and the trustees who are operating that railway under Spec. St. 1918, c. 159. Its object is to have certain provisions of that act declared unconstitutional and void as against the city of Boston, and to prevent the assessment upon that city of any part of the amounts paid under the act by the Commonwealth to the railway company to make up the deficiency between its revenues and expenses. We are of opinion that the plaintiff fails to make out a case on the merits. It has been argued at large by all parties. It is of great public importance. We therefore have not considered several preliminary questions which have been suggested and argued. Since the decree would be the same in any event, there appears "to be no objection to stating the grounds of substantive law which seem to us to support the result." Holmes, C. J., in Browne v. Turner, 176 Mass. 9, 12. To that end and for the same reason the amendment is allowed admitting the present Treasurer and Receiver General in place of the one named in the petition who has vacated that office.

In an opinion of the justices given to the honorable Senate and reported in 231 Mass. 603, the view was expressed that Spec. St. 1918, c. 159, violated no provision of the State or Federal Constitutions. The familiar rule is that such opinions are wholly advisory, given by the justices as individuals without the benefit of argument, and are not decisions of the court. When the questions therein considered arise in the course of litigation, the ground is re-examined by the justices sitting as a court in the light of the arguments presented and with the effort carefully to guard against any influence flowing from the earlier opinion. Young v. Duncan, 218

Mass. 346, 351, Perkins v. Westwood, 226 Mass. 268, 272, and cases collected in each judgment.

The allegations of the bill in substance are that by virtue of St. 1902, c. 534, and St. 1911, c. 741, the city of Boston has expended about $31,000,000 in the construction of subways and tunnels and has leased the same to the railway company, whereby all these subways and tunnels and also those built by it under earlier statutes, and the rents and profits thereof, are held by the city "in its private or proprietary capacity, for its own property" never to be taken by the Commonwealth except on payment of just compensation. The leases, which have been extended to July 1, 1936, provide for repairs by the lessee and maintenance of the demised property in good condition, and give the city the right of entry upon default
30 in payment of rent. The essential parts of said c. 159 are stated in or by reference imported into the bill. That act provides for public operation of the railway through a board of five trustees appointed by the Governor, who "shall manage and operate the Boston Elevated Railway Company * * * and the properties owned, leased or operated by it, for a period of ten years," and thereafter upon the same terms until such time as the Commonwealth shall elect to discontinue public management and operation, and who, subject to the provisions of the act, "shall take and have possession of said properties in behalf of the Commonwealth," with "the right to regulate and fix fares," transfers and other charges, and to "determine the character and extent of the service and facilities to be furnished." The railway company is required to raise $3,000,000 by the issuance of preferred stock with dividends not to exceed seven per cent, for the improvement of the property of the company and the establishment of a reserve fund. The trustees are directed to "fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses," fixed dividends on preferred stock and dividends on the common stock at the rate of five per cent for the first two years, five and one-half per cent for the next two years and six per cent for the remainder of the period of public operation. If there is a deficiency between the cost of operation as thus defined and the receipts, the trustees
31 are required to notify the Treasurer and Receiver General and the Commonwealth shall thereupon pay the amount of the deficit ascertained according to the act. The trustees are required to maintain the property of the railway company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation; that upon the expiration of the period of public management, the property shall be "in good operating condition," and shall then revert to the railway company. In case the Commonwealth is called upon to make payments to the trustees to meet deficits or diminution of the reserve fund provided for in the act, such amounts shall be assessed upon the several cities and towns in which the railway company operates by addition to

the State tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of the payments as determined by the trustees. The act contains provision for acceptance by stockholders of the Boston Elevated Railway Company, and of the West End Street Railway Company, but not by the city of Boston; that none of its provisions shall be construed to constitute a contract binding on the Commonwealth except those which define the terms and conditions under which the property shall be managed and operated by the trustees and the provisions of s. 13 relating to the upkeep of the railway company's property. The bill further alleges the appointment of trustees, performance of their functions, and the existence of
32 a deficit of nearly $4,000,000 as determined by the trustees, on July 18, 1919, notice whereof has been given to the Treasurer and Receiver General, who proposes to pay the amount to the company; that in ascertaining this deficit the trustees have charged for the fiscal year ending June 30, 1919, depreciation of approximately $2,000,000 and $2,300,000 for maintenance and repair, the average amount charged by the railway company for depreciation for the ten years prior thereto having been about $98,000 each year and having been inadequate, in consequence whereof the property had run down and was badly depreciated; that the amounts thus charged by the trustees for depreciation and maintenance and repairs are "excessive, unreasonable, unnecessary and illegal;" and that if assessment of this deficit is made according to the act, the plaintiff, as one of the cities liable therefor under the act, will be called upon to pay a very large proportion of any sum paid by the Commonwealth to the railway company. All the defendants demurred to the bill. One common ground is want of equity. Additional grounds of demurrer are set up by the trustees and by the Boston Elevated Railway Company.

Some analysis of the provisions of Spec. St. 1918, c. 159, is necessary in order to deal with the contentions that it is unconstitutional. Its general scope is indicated by its title, which is, "An Act to provide for the public operation of the Boston Elevated Railway Company." The accuracy of the title is confirmed by the substance of the act throughout. Its purpose is operation through public
33 officers and not public ownership. That is shown by the manifest tendency of its main provisions and is accentuated by s. 16, whereby definite terms for a sale to the Commonwealth or any political subdivision thereof, "at any time during the period of public management and operation," of the "whole assets, property and franchises" of the Boston Elevated Railway Company "as a going concern," are set forth, together with a further precautionary clause to the effect that the power of eminent domain is not thereby suspended. Examination in detail of the provisions of the act discloses that there is no inexorable legislative mandate that such public operation be undertaken. There is no power conferred upon the trustees to seize by eminent domain or to acquire in any other way ownership of the railway system of the railway company. It is expressly provided by s. 18 that the act, with the exception of s. 5

giving the company power to raise $3,000,000 by issuing preferred stock to that amount, shall take effect only upon its acceptance by majority vote of the stockholders of the two railway companies to be affected. In substance and effect the act is a proposition made by the Commonwealth to the two railway companies for their consideration and action. If either rejects that proposition, all goes for naught. If they both accept, then the act becomes vital and binding according to its terms. Those terms are contractual in their nature. That is plain not only from the general scope of the act but from the express provision in s. 18, that none of the provisions of the act shall constitute a contract binding upon the Commonwealth except those which define the terms and
34 conditions of the management and operation of the property of the railway company by the trustees, and those of s. 13 which constitute a contract binding upon the Commonwealth. The provisions of s. 13 relate to the maintenance of the property of the railway company in good operating condition and the restoration of the reserve fund, if depleted, to its original amount upon the expiration of the period of public management. In essence this act, having been accepted by the railway companies, constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amounts specified in way of compensation for the use thereof. The public operation is undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare. The main design of the act is public operation of the railway company at such rates of fare to be fixed by the trustees from time to time as shall afford revenue sufficient to defray all charges and the dividends established by the act.

The Commonwealth, acting through the General Court, has the constitutional power to assume the management and operation of the Boston Elevated Railway Company system. The reasons may be stated briefly. It is matter of common knowledge that the passenger transportation service for Boston and its suburbs is chiefly by the means afforded by that system through lines of electric railways on the surface, by elvated structures and through tun-
35 nels and subways. Under modern conditions the nature of that transportation system as to adequacy, efficiency, speed, safety, comfort and expense and in other respects relates to the accommodation of the public and concerns the public welfare. There is no distinction in principle between the management and operation of such a transportation system by a public agency established by the Legislature and the taking over by counties, cities and towns of toll bridges and turnpikes, originally private enterprises. The validity of such takings is settled. Andover & Medford Turnpike Corp. v. County Commissioners, 18 Pick. 486. Murray v. County Commissioners, 12 Met. 455. Central Bridge Corp. v. Lowell, 4 Gray, 474; S. C. 15 Gray, 106. It has been held that public ownership and operation of a ferry, Attorney General v. Boston, 123 Mass. 460, the construction at public expense for the uses of a

street railway of the Boston subway, Prince v. Crocker, 166 Mass. 347, and of the East Boston Tunnel, Browne v. Turner, 176 Mass. 9, all are valid under the Constitution. The grant of public money or aid for the construction of railroads has been made in numerous instances. See statutes collected in Kingman, petitioner, 153 Mass. 566, 570. Statutes have been enacted authorizing cities and towns to subscribe for the stock of railroads, Kittredge v. North Brookfield, 138 Mass. 286. Commonwealth v. Williamstown, 156 Mass. 70 The ownership and management of the Troy and Greenfield Railroad was taken over by the Commonwealth. Tory & Greenfield Railroad v. Commonwealth, 127 Mass. 43. Amstein v. Gardner,
36 134 Mass. 4. Property invested in street railways by private investors becomes thereby affected with a public interest. Donham v. Public Service Commissioners, 232 Mass. 309. In the light of these decisions of our own court the constitutionality of the act, so far as it provides for public operation of the elevated railway system, is beyond question. There are decisions in other jurisdictions to the effect that such an enterprise may be made a municipal function. Sun Printing & Publishing Association v. Mayor of New York, 152 N. Y. 257. Walker v. Cincinnati, 21 Ohio St. 14. Platt v. San Francisco, 158 Cal. 74, 81, 82. Barsaloux v. Chicago, 245 Ill. 598.

Four main objections are urged against the constitutionality of the act, so far as it concerns the city of Boston. These will now be considered.

1. The bill avers in effect that the trustees have charged for depreciation for a single year $2,000,000, while the railway company itself had for a period of ten years last prior to the inauguration of public management charged annually therefor only $98,000, and that owing to such inadequate charges for depreciation by the company and its failure to use sufficient money for maintenance and repairs, its property when it came under the management of the trustees was badly run down and depreciated and hence the trustees felt obliged in these respects to make up in large part for the neglect of the company in the past, and had charged for maintenance and repairs a sum in excess of $2,000,000, and that the amounts thus charged by the trustees are "excessive, unreasonable, un-
37 necessary and illegal," and that hence the deficiency certified by the trustees to the Treasurer and Receiver General for assessment upon the cities and towns under s. 14 of the act is "excessive, unreasonable, unnecessary and illegal." This allegation sets forth no ground for relief in equity. The general averments "excessive, unreasonable, unnecessary and illegal," standing alone and without statement of definite acts or facts which might accurately be described by such expletives, are of no consequence and do not merit judicial inquiry, and of course are not admitted by the demurrers. Nichols v. Rogers, 139 Mass. 146. Butler v. Directors of the Port of Boston, 222 Mass. 5, 8. Lothrop Publishing Co. v. Lothrop, Lee & Shepard Co. 191 Mass. 353. Marsch v. Southern New England Railroad, 230 Mass. 483, 494. The facts specifically set forth show nothing rendering the assessment of the deficiency contrary to any con-

stitutional guaranty. Great depreciation of the property of the railway company under its own management is alleged. That fact must be presumed to have been within the contemplation of the General Court when c. 159 was enacted. Rehabilitation of its property is necessarily authorized by s. 13 so far as may be required in order to return its property to the ailway company at the expiration of public control "in good operating condition." That was one of the terms of the offer made by the Commonwealth to the railway companies as an inducement for them to accept the act and become bound by its terms. The effect of the act when accepted, as it has been, was in its essential features a lease of the railway property to the Commonwealth,
38 or at least a contract for public operation upon stipulated terms. The extent of right in the property of the railway company to be used for the public was within the power of the legislature. Boston v. Talbot, 206 Mass. 82. The compensation to be paid by the Commonwealth was a subject which might be determined by the Legislature. Manifestly it was rational to make adequate provision in the management of property of this nature for charges for depreciation, obsolesence, repair and maintenance. Stein v. Strathmore Worsted Mills, 221 Mass. 86, 89. If the Commonwealth had seized by exercise of eminent domain the precise rights acquired by agreement through acceptance of the act by the railway companies, it would have been obliged to pay reasonable compensation therefor. There would be no constitutional reason why that reasonable compensation could not be fixed by agreement, the Legislature representing the Commonwealth. Said Chief Justice Shaw in Boston & Lowell Railroad v. Salem & Lowell Railroad, 2 Gray, 1, at page 32, "in addition to the lawmaking power, the Legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises, to stipulate for, purchase and obtain all such property, privileges, easements and improvements, as may be necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests." Referring to the accommodation of the public as to means of travel and transportation, it was said in Commonwealth v. Boston & Maine Railroad,
39 3 Cush. 25, at pages 45, 46, "the government may adopt whatever means they deem expedient for obtaining such accommodation. They may do it by a tax or charge on towns or counties or by direct appropriations from the public treasury, or by grants of land * * *"

It is matter of common knowledge, and has come to the attention of the court in cases to be decided, that the period after the opening of the Great War and at the time of the passage of this act was one of extraordinary difficulty and abnormal conditions for the operation of street railways. Donham v. Public Service Commissioners, 232 Mass. 309, 324. That circumstance doubtless affected in part the compensation for the use of the Boston Elevated Railway system agreed upon between the Commonwealth and the railway company through the enactment of the statute by the Legislature and its acceptance by the railway companies. The investment in the property

of the Boston Elevated Railway Company by its stockholders had been made subject to our laws against stockwatering, and in other respects designed to secure only honest investment in property of that nature. The provisions of the act for the rehabilitation of the property of the railway company constitute in no sense a gratuity to its stockholders. Whether the bargain made by the Commonwealth with the Boston Elevated Railway Company was wise or not is not a judicial question. That was a matter to be settled by the Legislature. Brayton v. Fall River, 124 Mass. 95. Hamilton v. Kentucky Distillers & Warehouse Co. 251 U. S. 146, 161. A street railway system was turned over for public management in return for the provisions made in the statute for the benefit of the owner. All those provisions, including that for rehabilitation of the railway property, are in the nature of compensation to be made for the use of the property. By the enactment of the statute the General Court determined that those provisions are reasonable compensation for such use.

It was not essential that the specific amounts to be charged for depreciation be determined by the Legislature. That was a matter which might be left to men of experience, to be appointed by the Governor, to decide as a practical question. Scituate v. Weymouth, 108 Mass. 128. Hingham & Quincy Bridge & Turnpike Corp. v. County of Norfolk, 6 Allen, 353. Boston v. Chelsea, 212 Mass. 127, 130. Opinion of the Justices, 234 Mass. 612, 617. Commonwealth v. Slocum, 230 Mass. 180, and cases collected at page 190. Lynn v. County Commissioners, 148 Mass. 148. De las Casas, petitioner, 180 Mass. 471, 472. Kingman, petitioner, 170 Mass. 111, 119. This was not a delegation of legislative power to the trustees. It conferred upon them powers of a kind which have been exercised in this Commonwealth by kindred bodies for many years. They have been recognized too long as not violative of any constitutional guaranty or provision now to be open to question. Brown v. Boston & Maine Railroad, 233 Mass. 502, and cases collected at page 511. Every rational presumption must be made in favor of the decision of men thus appointed. Their conclusion would not be set aside unless unsupported in law. Mayor & Aldermen of Springfield, petitioners, 234 Mass. 578, and cases collected at page 583.

There is nothing on this record to warrant the inference that the trustees have transcended their powers or failed to conform to the provisions of the act.

2. The city of Boston is not, and under the act cannot be, deprived of its property without reasonable compensation. It was provided in St. 1902, c. 534, s. 19, and St. 1911, c. 741, s. s. 4, 9 and 13, that the city of Boston owns "in its private or proprietary capacity, for its own property" the subways and tunnels in Boston. Without pausing to discuss the meaning of those provisions, it is assumed in favor of the city of Boston that its property rights therein are of such a nature as to be within the protection of the constitutional principle declared in Moun Hope Cemetery v. Boston, 158 Mass. 509, and that they cannot be appropriated to other public uses or to use by another

public agency without making reasonable compensation to the city. Giving to the city of Boston the benefit of the fullest sweep of that principle, there is nothing contrary to it in c. 159. That act does not make any taking or authorize any seizure under the power of eminent domain of the subways or tunnels. Those structures are alleged in the bill to be now under lease to the Boston Elevated Railway Company by leases expiring in 1936. The trustees are directed in c. 159, by s. 1, to "assume the management and operation of the company's property," and by s. 2, to "manage and operate the Boston Elevated Railway Company * * * and the properties owned,
42 leased, or operated by it." These phrases manifestly do not authorize any taking of the subways or tunnels. The trustees must assume control of the rights of the railway company under its leases, but they can go no further than that. By s. 2, the trustees, "subject to the provisions of this act, shall take and have possession of said properties in behalf of the Commonwealth during the period of public operation." As matter of grammatical construction, the word "take" in this context has for its object the word "possession." It is not used in the sense of expropriate or seize under eminent domain. The phrase means that the trustees shall take possession and continue to have possession of the properties under the terms of the act. That a possessory right only is intended is clear from the subsequent clause in s. 2, to the effect that "In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees * * * shall be deemed to be acting as agents of the company. * * *" The description of the properties, possession of which the trustees are to take and hold, is not broad enough to include anything more than the rights of the railway company therein. It does not go far enough to include underlying ownership where the company has only a leasehold interest. The words of the statute fall short of empowering the trustees to take the subways under eminent domain. The act as a whole makes plain that no seizure by eminent domain is contemplated. That power is recognized in s. 13 as not having been exercised and the existence of the possibility of its
43 exercise in the future is there avowed.

It is not alleged in the bill that in the leases of the subways and tunnels to the railway company there is any provision against an assignment of all its rights under the leases by the railway company. In the absence of any such provision, the lessor cannot complain of an assignment by the lessee of its rights. Patten v. Deshon, 1 Gray, 325. Peters v. Stone, 193 Mass. 179. Essex Lunch, Inc. v. Boston Lunch Co. 229 Mass. 557. The trustees have acquired, and possess authority under the act to acquire, in the subways and tunnels, only the rights therein of the railway company under its leases. The facts set forth in the bill do not constitute a taking of any property right of the city of Boston.

A change in the management of the railway company obviously cannot be a taking of the city's property in the subways and tunnels. Such change of management might be accomplished by a sale of the

stock by its stockholders, of which the city could not complain. Brightman v. Bates, 175 Mass. 105, 111.

Even if possession by the trustees is possession by the Commonwealth, the city has no ground for complaint. For failure to perform the covenants of the lease, it has a right of action against the company under s. 2 of the act constituting the trustees agents of the railway company. It is made the express duty of the trus-
44 tees by s. 3 "to cause to be paid all the amounts which may from time to time become due from the company." The payment of rental is thus made at least as secure as it has been hitherto. No contractual right of Boston is impaired in any particular. All the rights that it had before the enactment of the statute are preserved in full force and something of value has been added.

3. The act neither constitutes nor authorizes a taking, either in the present or suspended until or operative upon, the expiration of the leases in 1936. The trustees have not acquired and have no power to obtain any higher or other rights in the subways and tunnels than the railway company owns. The circumstance that under s. 12 the period of public control may extend beyond the time when the leases expire in 1936 is of no consequence in this connection. The trustees will have no greater right in the subways and tunnels after the expiration of the leases than the railway company would have. The city will have power to enforce whatever rights of possession it may have in the subways and tunnels after the expiration of the leases in 1936, regardless of the fact that public operation may not then have been discontinued. Considering the trustees as representatives of the Commonwealth in this particular, the city would have the same right to maintain a writ of entry against the Commonwealth as against the railway company both before and after the expiration of the leases. G. L. c. 237, s. 2; c. 245, ss. 9, 12.

45 4. The provisions of s. 14, authorizing the assessment of any deficiency arising under ss. 11 and 13 upon the cities and towns in which the railway company is operated, in proportion to the number of persons using the service in accordance with computations made by the trustees, is not unconstitutional. This is an exercise of the power of taxation. The purpose for which it is put forth is a public purpose. That point already has been elaborated in this opinion. It is a purpose for which public money may be appropriated. It is to be levied in a manner long sanctioned by the customs of this Commonwealth. In re Metropolitan Park Commissioners, petitioners, 209 Mass. 381 and cases collected at page 384. Boston, petitioner, 221 Mass. 468. Duffy v. Treasurer & Receiver General, 234 Mass. 42, 52. The apportionment of the tax established by s. 14 falls ratably upon the cities and towns in proportion to benefits derived from the use of the railway system without regard to the location of subways or tunnels. It is not, however, essential that a tax of this sort be apportioned according to benefits received by localities. Mayor & Aldermen of Springfield, petitioners, 234 Mass. 578, 582, 583. Duffy v. Treasurer & R

ceiver General, 234 Mass. 42, 52. The fact that some of the money raised by taxation or the whole of this particular increment of taxation may go toward making up a deficiency caused in part by payment of rentals due to Boston under the subway and tunnel leases is not decisive in this connection. The two capacities are
46 utterly separate and entirely disconnected. The building of the subways was a public purpose. The city rightfully was given a right to rent them to the railway company. The making of such leases in no way impaired or limited the right of the State to tax for any lawful purpose. The principle of Norwood v. Baker, 172 U. S. 269, has no relevancy to the facts here disclosed. The illustrations put in argument are pertinent. Boston in its proprietary character as owner, entitled to rent of its property leased to the railway company, has no more legal ground to complain of taxes assessed upon its inhabitants for the maintenance of a transportation service than has the owner of a public bond taxed in part to pay interest on public bonds, or the owner of a parcel of real estate taxed in part to pay damages caused by the taking from him of another parcel for some public use. Private individuals owning property leased to the railway company would have equal cause for complaint with respect to taxes assessed upon them. Boston, however, is not assessed in its proprietary capacity at all. So far as concerns assessment of taxes, it is adopted for convenience as a taxing district. In this particular its functions are exclusively governmental. The Legislature might have made it a part of a larger or different taxing district for this purpose and might have levied and collected taxes through different agencies. Kingman, petitioner, 153 Mass. 566. Adams, petitioner, 165 Mass. 497. In re Metropolitan Park Commissioners, petitioners, 209 Mass.
47 381. Duffy v. Treasurer & Receiver General, 234 Mass. 42. Opinion of the Justices, 234 Mass. 612. The circumstance that an existing municipal governmental agency was used for the assessment and collection of a tax for a public purpose gives that existing municipal governmental agency, so far as it has private proprietary rights, no ground for just complaint.

Every point urged in behalf of the city of Boston has been considered with care. It is not necessary to discuss them in further detail. Treating the bill on its merits, the conclusion is that c. 159 violates no constitutional right of the city of Boston and the bill sets forth no ground for relief. The decree overruling the demurrers must be reversed and a decree entered sustaining the demures for want of equity.

So ordered.

48 [Endorsed:] Boston vs. Treas. & Rec. Gen. Certified Copy of the Opinion of the Supreme Judicial Court.

49 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

Equity. 31599.

CITY OF BOSTON

v.

TREASURER & RECEIVER-GENERAL et al.

Petition for Writ of Error.

Your petitioner, the City of Boston, plaintiff in the above entitled proceeding represents that heretofore on the eleventh day of June 1921, final judgment was rendered against your petitioner in the Supreme Judicial Court within and for the County of Suffolk, in the Commonwealth of Massachusetts, and that in the final judgment and the proceedings had prior thereto certain errors were committed to the prejudice of the said plaintiff, as more fully appears in its assignment of errors filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue to the Supreme Judicial Court sitting at Boston within and for the County of Suffolk and Commonwealth of Massachusetts for the correction of the errors complained of and that a transcript of the record herein, duly authenticated, be sent to the Supreme Court of the United States.

CITY OF BOSTON,
By ARTHUR D. HILL,
Corporation Counsel.

50 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

Equity. No. 31599.

CITY OF BOSTON

v.

TREASURER AND RECEIVER-GENERAL et al.

Assignment of Errors.

And now, after the filing of its petition for a writ of error, comes the City of Boston, plaintiff in the above entitled cause, and says that in the final judgment and decree, and the proceedings had prior thereto, there is manifest error, to wit:

1. The Court erred in refusing to hold that the provisions of Chapter 159 of the Special Acts of 1918 authorizing the assessment through taxation upon the plaintiff in the manner provided for in said act and under the circumstances and facts as described and set forth in the plaintiff's bill of complaint as amended, were palpably unconscionable, arbitrary and unreasonable and in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section
51 10 of Article 1 of the Constitution of the United States as impairing the obligation of contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts and embodied in Chapter 534 of the Acts of 1902 and Chapter 741 of the Acts of 1911.

2. The Court erred in refusing to hold that the provisions of Chapter 159 of the Special Acts of 1918 assessed through taxation the plaintiff for unreasonable and private purposes for the benefit of a private corporation and were in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between the plaintiff in error and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911.

3. The Court erred in holding and deciding that the provisions of Chapter 159 of the Special Acts of 1918 authorizing the trustees in their absolute discretion and without limitation to determine an allowance for depreciation, rehabilitation, and for obsolescence and losses in respect to property sold such allowance to be charged in the cost of the service and included in the deficit to be paid ultimately in great part by the plaintiff were not in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and
52 denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between said plaintiff and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911 and of certain contracts or leases previously entered into between said plaintiff and the Boston Elevated Railway Company.

4. The Court erred in holding and deciding that the amount charged by the trustees for depreciation in the manner and under the circumstances as set forth in the bill of complaint and included in the deficit as described in the preceding assignment of error, was not unreasonable, illegal and in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitu-

tion of the United States as impairing the obligation of the co
tracts previously entered into between said plaintiff and the Commo
wealth of Massachusetts and embodied in the aforesaid acts of 190
and 1911 and of the contracts or leases previously entered into b
tween said plaintiff and the Boston Elevated Railway Company.

5. The Court erred in holding constitutional the provisions
chapter 159 of the Special Acts of 1918, authorizing the assessme
through taxation of the deficit resulting from the operation
53 the Boston Elevated Railway Company by the trustees a
pointed under the said Special Acts of 1918 in part upon t
plaintiff, which deficit, among other items, included the rents r
ceived under the subway leases by the plaintiff from the Bost
Elevated Railway Company, which rents are, by virtue of pri
contracts embodied in Chapter 534 of the Acts of 1902 and Chapt
741 of the Acts of 1911 between the plaintiff and Commonwealth
Massachusetts, held by the plaintiff in its private or proprieta
capacity and are never to be taken by the Commonwealth except
the payment of just compensation; and in holding that said pr
visions were not in violation of the XIV Amendment to the Co
stitution of the United States as depriving the plaintiff of its pro
erty without due process of law, and denying it the equal protecti
of the laws, and of section 10 of Article 1 of the Constitution of t
United States as impairing the obligation of the contracts previous
entered into between the plaintiff and the Commonwealth of Mas
chusetts and embodied in the aforesaid acts of 1902 and 1911.

6. The Court erred in holding constitutional the provisions
chapter 159 of the Special Acts of 1918, authorizing the assessme
through taxation of the deficit resulting from the operation of t
Boston Elevated Railway Company by the trustees appointed und
the said Special Acts of 1918 in part upon the plaintiff, which defic
among other items, included the rents received under t
54 subway leases by the plaintiff from the Boston Elevated Ra
way Company, which rents are by virtue of Chapter 534
the Acts of 1902 and Chapter 741 of the Acts of 1911 held by t
plaintiff in its private proprietary capacity and are never to be tak
by the Commonwealth except on the payment of just compensatio
and in holding that said provisions were not in violation of the XI
Amendment to the Constitution of the United States as deprivi
the plaintiff of its property without due process of law and denyi
it the equal protection of the laws.

7. The Court erred in holding constitutional the provisions
chapter 159 of the Special Acts of 1918 authorizing the assessme
through taxation of the deficit resulting from the operation of t
Boston Elevated Railway Company by the trustees appointed und
said Special Acts of 1918 in part upon the plaintiff, which defic
among other items, included the cost of repairs which under t
terms of the leases or contracts previously entered between the pla
tiff and the Boston Elevated Railway Company were to be ma
by the said company; and in holding that said provisions were

in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitution of the United States as impairing the obligation of the said leases or contracts between the plaintiff and the said Company and the contracts previously
55 entered into between the plaintiff and the Commonwealth of Massachusetts, embodied in the aforesaid acts of 1902 and 1911.

8. The Court erred in refusing to hold that the provisions of Chapter 159 of the Special Acts of 1918 effected a taking of the subways, either immediately of the subways themselves or a present taking of the plaintiff's right to possession in 1936, did not provide adequate compensation for such taking and were in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts embodied in the aforesaid acts of 1902 and 1911.

9. The Court erred in refusing to hold that the provisions of Chapter 159 of the Special Acts of 1918 took the subways or the plaintiff's interest in them for an indefinite period of time after the leases fall in, did not provide adequate compensation and were in violation of the XIV Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of Article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts, embodied
56 in the aforesaid acts of 1902 and 1911.

10. The Court erred in dismissing the bill of complaint as amended thereby depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws contrary to the XIV Amendment to the Constitution of the United States, and impairing the obligation of the contracts previously entered into by the plaintiff contrary to section 10 of Article 1 of the Constitution of the United States.

All the Federal questions hereinbefore set out were duly raised by the plaintiff's bill of complaint and at all subsequent stages of the case.

CITY OF BOSTON,
By ARTHUR D. HILL,
Corporation Counsel.

[Endorsed:] Commonwealth of Massachusetts, Suffolk, ss. Equity. No. 31599. City of Boston v. Treasurer and Receiver General et al. Assignment of errors. Suffolk, ss. Supreme Judicial Court. Filed Jan. 15, 1921. John F. Cronin, clerk.

57 (D. C. Form 412*a*.)

[*Bond on Writ of Error.*]

Know all men by these presents, that we, City of Boston, a municipal corporation of the Commonwealth of Massachusetts, as principal National Surety Company a Corporation duly established under the laws of the State of New York, and having an usual place of business in Boston, in the County of Suffolk, and Commonwealth of Massachusetts as surety are held and firmly bound unto James Jackson, Treasurer & Receiver General of the Commonwealth of Massachusetts; James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens and Winthrop Coffin as they are Trustees of the Boston Elevated Railway Company; and the Boston Elevated Railway Company in the full and just sum of Five hundred (500) dollars to be paid to the said James Jackson, Treasurer & Receiver General and others or to their certain Attorney, Executors, Administrators, Successors or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the thirteenth day of July in the year of our Lord one thousand nine hundred and twenty-one.

Whereas lately at a sitting of the Supreme Judicial Court of Massachusetts holden at Boston within and for the County of Suffolk in a suit depending in said Court between the City of Boston, plaintiff and the said James Jackson, Treasurer & Receiver General et al. in a bill of complaint judgment was rendered against the said City of Boston, dismissing its said bill of complaint and the said City of Boston having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Jackson, Treasurer & Receiver General et al. citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said City of Boston shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CITY OF BOSTON. [SEAL.]
ANDREW J. PETERS, [L. S.]
Mayor.
NATIONAL SURETY COMPANY, [L. S.]
By COLLINS GRAHAM,
Resident Vice President.

Attest:

FREDERICK M. SALLES, JR., [SEAL.]
Resident Assistant Secretary.

COLLINS GRAHAM.
FREDERICK M. SALLES, JR.,

Signed, sealed, and delivered in presence of
JOSEPH P. LYONS.

July 15, 1921.

Approved:
ARTHUR P. RUGG,
Chief Justice of the Supreme
Judicial Court of Massachusetts.

Authority of officers signing on file at Washington, D. C.

58 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Jackson, Treasurer & Receiver General of the Commonwealth of Massachusetts; James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens, and Winthrop Coffin, as they are Trustees of the Boston Elevated Railway Company, and the Boston Elevated Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* twelfth day of August next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts wherein the City of Boston is plaintiff in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this fifteenth day of July, in the year of our Lord one thousand nine hundred and twenty one.

ARTHUR P. RUGG,
Chief Justice of the Supreme
Judicial Court of Massachusetts.

59 Due and sufficient service of the within writ is hereby accepted and acknowledged in behalf of James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens and Winthrop Coffin as they are Trustees of the Boston Elevated Railway Company.

By Their Attorney, H. WARE BARNUM.

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

Due and sufficient service of within writ is hereby accepted and acknowledged in behalf of Boston Elevated Ry. Company.
By Its Attorneys, GASTON, SNOW, SALTONSTALL & HUNT.

Boston, July 15, 1921.

Accepting due and sufficient service on behalf of James Jackson, Treasurer and Receiver General of the Commonwealth of Massachusetts.

J. WESTON ALLEN,
Attorney General.

Boston, July 15, 1921.

60 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

Equity. 31599.

CITY OF BOSTON

v.

TREASURER & RECEIVER-GENERAL et al.

Præcipe.

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts:

Please incorporate into the transcript of the record to accompany your return to the writ of error:

(1) Report to Full Court.

(2) Substitute Bill of Complaint as Amended (Report p. 1).

(3) Demurrer of James F. Jackson, et al., as they are trustees of the Boston Elevated Railway Company.

(4) Demurrer of Charles L. Burrill, Treasurer and Receiver General.

(5) Demurrer of the Boston Elevated Railway Company.

(6) Interlocutory decree overruling the demurrers.

(7) Rescript.

(8) Opinion of the Full Court.

(9) Amendment to Substitute Bill of Complaint as Amended, filed and allowed, June 11, 1921.

(10) Stipulation Relative to Demurrers.

(11) Demurrer of James Jackson, Treasurer and Receiver General.

(12) Final Decree.

(13) Petition for Writ of Error.

(14) Assignment of Errors.

(15) Bond.

(16) Citation on Writ of Error and proceedings thereon.

(17) Copy of this Præcipe and affidavit of service thereof.

counsel for the plaintiff deeming the above *petitions* of the record to be material to and necessary for a decision on the questions involved.

Respectfully,

CITY OF BOSTON,
By ARTHUR D. HILL,
Corporation Counsel.

61 I, Nathan Matthews, of counsel for the plaintiff in error in the above entitled proceedings hereby certify, declare and state that I have served a copy of the foregoing præcipe on the defendants in error by sending on July 15, 1921, a copy thereof by mail, postage prepaid to the Attorney General of the Commonwealth of Massachusetts, Boston, Mass., Attorney for the Treasurer & Receiver-General; to H. Ware Barnum, attorney for James Jackson, et al., trustees, at his usual place of business at 108 Massachusetts Ave., Boston, Mass., and to Gaston, Snow, Saltonstall & Hunt, Attorneys for the Boston Elevated Railway Company, at their usual place of business, at 55 Congress Street, Boston, Mass.

NATHAN MATTHEWS.

COMMONWEALTH OF MASSACHUSETTS,
Boston, Suffolk, ss:

Subscribed and sworn to before me this fifteenth day of July, 1921.
Before me,

CARL H. BAESLER,
Justice of the Peace.

My Commission Expires Sept. 30, 1926.

62 [Endorsed:] Commonwealth of Massachusetts, Supreme Judicial Court. Suffolk, ss. Equity. 31599. City of Boston v. Treasurer & Receiver-General et al. Præcipe.

63 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of City of Boston, Petitioner, vs. Treasurer and Receiver General, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors, copy of bond and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this twenty-second day of July in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] JOHN F. CRONIN,
Clerk.

Endorsed on cover: File No. 28415. Massachusetts Supreme Judicial Court. Term No. 460. The City of Boston, plaintiff in error, vs. James Jackson, treasurer & receiver general of the Commonwealth of Massachusetts; James F. Jackson, Samuel L. Powers, et al., trustees, &c., et al. Filed August 11th, 1921. File No. 28415.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 460

THE CITY OF BOSTON, Plaintiff in Error,

v.

JAMES JACKSON, Treasurer and Receiver General of the Commonwealth of Massachusetts; JAMES F. JACKSON, SAMUEL L. POWERS et al., Trustees, et al.

In Error to the Supreme Judicial Court of Massachusetts

MOTION TO DISMISS OR AFFIRM AND BRIEF

J. WESTON ALLEN
Attorney General for the Commonwealth of Massachusetts

ALEXANDER LINCOLN
Assistant Attorney General

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annexed, such payment and assessment have already been made by a former Treasurer and Receiver General not now a party to these proceedings, and further the amount so assessed has been paid by the plaintiff in error and in turn collected by it from its taxpayers; and because the record shows no basis on which the bill can be retained for other relief.

2. Because the relief sought by said bill against the Treasurer and Receiver General was sought against the then incumbent of that office, Charles L. Burrill, who is not now a party to these proceedings; and because no allegations are made in said bill with respect to the present Treasurer and Receiver General, the defendant in error James Jackson.

The said defendant in error also moves the court to affirm the final decree of the Supreme Judicial Court of the Commonwealth of Massachusetts dismissing the bill of complaint, on the ground that the points raised by the writ of error are foreclosed by prior decisions of the court.

JAMES JACKSON,
Treasurer and Receiver General of the Commonwealth of Massachusetts.

By J. WESTON ALLEN,
Attorney General of the Commonwealth of Massachusetts.

AFFIDAVIT.

BOSTON, August 22, 1922.

I, James Jackson, Treasurer and Receiver General of the Commonwealth of Massachusetts, hereby certify that the following facts are shown by the books, papers, documents and records of the Treasury Department of the Commonwealth:

On July 16, 1919, Charles L. Burrill, Treasurer and Receiver General, was formally notified by the Trustees of the Boston Elevated Railway Company, in accordance with section 11 of Chapter 159 of the Special Acts of 1918, that the amount of the deficiency between income during the period of operation by the trustees and cost of service, as of June 30, 1919, less the amount in the reserve fund applicable thereto, was $3,980,151.67. A copy of said notice, dated July 1, 1919, is hereto annexed, marked "Exhibit A".

On July 24, 1919, the amount above stated was paid by said Burrill, as Treasurer and Receiver General, to the Company, and the Company gave its receipt therefor, of which a copy is hereto annexed, marked "Exhibit B".

On August 14, 1919, said Burrill as Treasurer and Receiver General notified the assessors of the City of Boston, by his warrant, that they were required to assess, in addition to the amount to be assessed for the State tax, the sum of $2,905,930.87, and that the city was required to pay to the Treasurer of the Commonwealth said sum, being the proportionate amount due from it under said Act, namely 71.9330 per cent of the amount paid by said Burrill to the Company, with interest, on or before November 15, 1919. A copy of said warrant is hereto annexed, marked "Exhibit C".

On November 15, 1919, said amount was paid by the Treasurer of the City of Boston under protest. A copy of said protest is hereto annexed, marked "Exhibit D".

JAMES JACKSON,
Treasurer and Receiver General.

SUFFOLK, ss. BOSTON, MASS., August 22, 1922.

Then personally appeared the above-named James Jackson and made oath that the above statement by him subscribed is true to the best of his knowledge and belief.

Before me,

GEORGE B. WILLARD,
Notary Public.

EXHIBIT A.

BOSTON ELEVATED RAILWAY COMPANY,
101 MILK ST., BOSTON, July 1, 1919.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General, State House, Boston, Mass.*

SIR: — The Trustees of the Boston Elevated Railway Company, under the provisions of Chapter 159 of the Special Acts of 1918, hereby notify you as Treasurer and Receiver-General of the Commonwealth, in accordance with Section II of said Acts: That as of the last day of June in the year Nineteen Hundred and Nineteen, the income of the Company during the period since said Trustees began to manage and operate the Company, as provided in Section 2 of said Act, has been insufficient to meet the cost of the service as defined in said Act by the amount of

Four million nine hundred eighty thousand one hundred fifty-one dollars sixty-seven cents $4,980,151 67

that the amount of the reserve fund applicable thereto is One Million Dollars; and that the amount of such deficiency less the amount in the reserve fund applicable thereto is

Three million nine hundred eighty thousand one hundred fifty-one dollars sixty-seven cents $3,980,151 67

(Signed) JAMES F. JACKSON,
SAM'L L. POWERS,
STANLEY R. MILLER,
JOHN F. STEVENS,
WINTHROP COFFIN,
Trustees of the Boston Elevated Railway Company.

EXHIBIT B.

JULY 24, 1919.

Received of Charles L. Burrill, Treasurer and Receiver-General of the Commonwealth of Massachusetts, check First National Bank, Boston, $3,980,151.67, being amount payable to the Boston Elevated Railway Company under section II of chapter 159, Special Acts of 1918, to meet the deficiency up to July 1, 1919, of the Boston Elevated Railway Company now operating under said Act, as per certificate of the Trustees of the Boston Elevated Railway Company, dated July 1, 1919, certifying to the cost of service as defined in the above Act.

BOSTON ELEVATED RAILWAY COMPANY.

By (Signed) HENRY L. WILSON,
Treasurer.

EXHIBIT C.

AUGUST 14, 1919.

To the Assessors of the City of Boston.

GENTLEMEN: — In accordance with the provisions of chapter 159 of the Special Acts of the year 1918, entitled "An Act to provide for the public operation of the Boston Elevated Railway Company," and all acts in addition thereto and amendment thereof, you are, in the name of The Commonwealth of Massachusetts, required to assess, in addition to the amount to be assessed for the State Tax, the sum of Two million nine hundred five thousand nine hundred thirty and 87/100 dollars, ($2,905,930.87). Of this amount, $2,863,042.50 is to meet the requirements for maturing notes and $42,888.37 is to pay interest on the same.

You are likewise required to pay, or issue your warrant requiring the treasurer of said city to pay, to the treasurer of this Commonwealth, on or before the fifteenth day of November, 1919, the aforesaid sum of $2,905,930.87.

Given under my hand and seal this fourteenth day of August in the year of our Lord nineteen hundred and nineteen.

(Signed) GEORGE B. WILLARD,
Deputy Treasurer and Receiver-General of the Commonwealth of Massachusetts.

Proportion assessed upon above city, 71.9330 per cent.

EXHIBIT D.

CITY OF BOSTON, OFFICE OF CITY TREASURER,
BOSTON, November 15, 1919.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General, State House, Boston, Mass.*

DEAR SIR: — The check enclosed payable to the order of Charles L. Burrill, Treasurer and Receiver-General of the Commonwealth of Massachusetts, No. 51915 on the National Shawmut Bank of Boston for Two Million, Nine Hundred Five Thousand, Nine Hundred Thirty and 87/100 ($2,905,930.87) Dollars covers the amount of the warrant served by you as Treasurer and Receiver-General of the Commonwealth of Massachusetts upon the assessors of the City of Boston and assessed under the provisions of Sp. St. 1918, c. 159.

This payment is made by the City of Boston under protest without waiving any of the rights of the city to contest the validity of the assessment and of its obligation to pay the same.

Yours very truly,

(Signed) THOS. W. MURRAY,
City Treasurer.

1 enc.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 460.

THE CITY OF BOSTON, *Plaintiff in Error,*

v.

JAMES JACKSON, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; JAMES F. JACKSON, SAMUEL L. POWERS ET AL., TRUSTEES, ETC., ET AL.

BRIEF OF ARGUMENT.

STATEMENT OF THE CASE.

This is a motion to dismiss a writ of error and to affirm a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts. The judgment from which the writ of error is taken was a decision ordering the entry of a final decree sustaining demurrers to a substitute bill of complaint in the Supreme Judicial Court filed by the plaintiff in error and a final decree dismissing the bill of complaint (Rec., pp. 1, 12, 17).

The case stated by the substitute bill of complaint (Rec., pp. 3–9), so far as affects pending issues, is substantially as follows:

The defendant Boston Elevated Railway Company is now being managed and operated by a board of trustees, also defendants to the bill, under the provisions of chapter 159 of the Special Acts of 1918. That act provides for public operation of the railway company through a board of five trustees appointed by the Governor, for a period of ten years and thereafter at the election of the Commonwealth, the trustees being authorized to take and have possession of the properties of the company in behalf of the Commonwealth, to regulate and fix fares, transfers and other charges, and to determine the character and extent of the service and facilities to be furnished. Cost of service is to include operating expenses, fixed charges, including dividends on stock, and depreciation, and the property at the end of the period of public management is to be returned to the company in good operating condition. The Commonwealth of Massachusetts is to pay to the company the amount of any deficiency between the cost of service ascertained as provided by the act and the revenue of the company. Any amount which the Commonwealth pays to the company to meet such deficiency is to be assessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service as determined by the trustees. The act contains provision for acceptance by the stockholders of the company. The trustees have notified the Treasurer and Receiver General of the Commonwealth of a deficiency which the Commonwealth was obliged to pay amounting to nearly four million dollars, and the Treasurer and Receiver

General proposes to pay that sum to the company on July 18, 1919. The plaintiff is one of the cities and towns in which the company operates and will be called upon to pay a very large percentage of any amount which the Commonwealth pays to the company.

The bill further states that for the fiscal year ending June 30, 1919, the trustees have charged in the cost of service approximately $2,000,000 for depreciation and $2,300,000 for maintenance and repairs, that prior to the management by the trustees the property was badly run down and depreciated, and the sums charged by the trustees were in large part to make up for the neglect of the past. The bill also avers that by virtue of the provisions of statutes passed in 1902 and 1911 the plaintiff owns in its private or proprietary capacity certain subways and tunnels constructed therein and the right to receive rents and profits therefrom, and that leases or contracts relating to the use of said subways have been entered into between the plaintiff and the company providing for the payment of fixed rents to the plaintiff.

The plaintiff alleges that the act of 1918 violates its rights under the Constitution of the United States in that it impairs the obligations of contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts and embodied in the acts of 1902 and of 1911, above referred to, and the obligations of the contracts or leases previously entered into between the plaintiff and the defendant Boston Elevated Railway Company, contrary to Article I, section 10, of the Constitution of the United States, and in that it deprives the plaintiff of its property without due process of law and denies to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

The bill contains prayers as follows:

"That an injunction be issued against the Treasurer and Receiver General restraining him from paying to the Company the amount which the trustees have notified him he is to pay and which he proposes to pay; that said c. 159 of the Special Acts of 1918 be declared unconstitutional and null and void; that the trustees of the Company be perpetually enjoined from determining the amount of the deficiency between income and cost of service as defined in said c. 159, and from notifying the Treasurer and Receiver General of the Commonwealth thereof; that the Treasurer and Receiver General of the Commonwealth be perpetually enjoined from assessing upon the plaintiff the whole or any part of any amount or amounts which the Commonwealth has paid or shall pay to the Company or from issuing any warrant in connection therewith or attempting to levy upon the plaintiff any tax for any part of such amount or amounts, and for such other and further relief as your Honorable Court may deem necessary or expedient in the premises."

To this bill Charles L. Burrill, then Treasurer and Receiver General of the Commonwealth, was a party. He filed a demurrer upon three grounds:

"1. The complainant has no standing to bring a bill in equity against him on the grounds therein set forth.

2. Said bill can not be maintained against this respondent in his capacity as Treasurer and Receiver General of the Commonwealth.

3. Said bill sets forth no grounds for relief in equity against this respondent. (Rec., p. 9.)"

Demurrers were also filed in behalf of the other defendants (Rec., pp. 10, 11, 16).

These demurrers were overruled by the presiding judge and the case was reported to the full court of the

Supreme Judicial Court (Rec., pp. 3, 11, 12). The case was heard by that court and a decision rendered reversing the decree overruling the demurrers and ordering a decree to be entered sustaining the demurrers for want of equity (Rec., p. 12). Thereafter the plaintiff moved for leave to amend its bill by substituting James Jackson, the present Treasurer and Receiver General of the Commonwealth, for Charles L. Burrill as one of the parties defendant (Rec., p. 15). This motion was allowed and a demurrer was filed in behalf of said James Jackson upon the same grounds as the demurrer of the former treasurer, Charles L. Burrill (Rec., p. 14). A final decree was entered sustaining the demurrers for want of equity and dismissing the bill of complaint (Rec., p. 17).

The opinion of the full court of the Supreme Judicial Court deals with the questions presented by the demurrers on their merits and holds that the act of 1918 violates no constitutional right of the city of Boston and that the bill sets forth no ground for relief (Rec., pp. 18–27). The opinion recites the allegations of the bill in substance and analyzes the provisions of the act of 1918. It then considers in their order four main objections urged by the plaintiff against the constitutionality of the act. It holds that rehabilitation of its property was one of the terms of the offer made by the Commonwealth as an inducement to the company to accept the act, that the provisions for the benefit of the company, including that for rehabilitation, were in the nature of compensation for the use of the property, and that the specific amounts to be charged for depreciation need not be determined by the Legislature, but might be left to the trustees; that the city of Boston

is not, and under the act cannot be, deprived of its property without reasonable compensation, and that as a matter of construction the act does not make any taking or authorize any seizure under the power of eminent domain of the subways or tunnels belonging to the city of Boston, — it gives to the trustees only the rights therein of the company under its leases; that the trustees will have no greater right in the subways and tunnels after the expiration of the leases than the company would have; and that the provisions authorizing the assessment of any deficiency upon the cities and towns in which the railway is operated in proportion to the number of persons using the service, in accordance with computations made by the trustees, is an exercise of the power of taxation, for a public purpose, and is not unconstitutional.

The Motion to Dismiss or Affirm.

The defendant in error James Jackson, Treasurer and Receiver General, has filed a motion to dismiss or affirm, asking the court to dismiss the writ of error on the ground that the payment and assessment sought to be enjoined have been made, that the tax assessed to the plaintiff in error has been paid and collected from the taxpayers, that the state treasurer sought to be enjoined is not now a party, and that no allegations are made in the bill with respect to the present treasurer, the moving party; and asking the court to affirm the final decree dismissing the bill on the ground that the points raised by the writ of error are foreclosed by prior decisions of the court. In support of the motion an affidavit of the state treasurer is submitted showing the fact that the amount of the deficiency which the

Commonwealth was obliged by the act of 1918 to pay has been paid, that the plaintiff in error has been assessed its proportionate amount, and that it has paid the tax.

STATE STATUTES CITED.

Spec. St. 1918, c. 159, is entitled "An Act to provide for the public operation of the Boston Elevated Railway Company" and provides in part:

SECTION 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided and until their successors are duly appointed and qualified, and each shall receive from the company as compensation for his services five thousand dollars annually. In case of any vacancy in said board by reason of death, resignation or otherwise, the governor, by and with the consent of the council, shall fill the vacancy. The board shall designate one of the trustees so appointed to serve as chairman. Any member of the board may be removed for cause by the governor, with the advice and consent of the council.

. . . . . .

If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor

trustees to serve for a period of ten years and until their successors are appointed and qualified, but not exceeding the period of public management and operation. Said trustees shall assume the management and operation of the company's property on the first day of the month next following their appointment and qualification.

SECTION 2. Said board of trustees, hereinafter called the trustees, shall manage and operate the Boston Elevated Railway Company hereinafter called the company, and the properties owned, leased or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and, subject to the provisions of this act, shall take and have possession of said properties in behalf of the commonwealth during the period of public operation, and, for the purposes of this act, shall, except as is otherwise provided in this act have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds. They shall have the right to appoint and remove in their discretion the president, treasurer and clerk of the corporation, and all officers of the company other than the board of directors. They shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.

In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their agents, servants and employees shall be deemed to be acting as agents of the company and not of the commonwealth, and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable.

A majority of the board shall constitute a quorum for the transaction of business, and the action of a majority of those present at any meeting shall be deemed the action of the trustees.

Nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property.

SECTION 3. The trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds and other evidences of indebtedness of, the company. No contracts for the operation or lease of any subways, elevated or surface lines in addition to those now owned, leased or operated by the company, or any extensions thereof beyond their present limits, shall be entered into which shall involve the payment of any rental or other compensation by the company beyond the period of public operation without the consent of the directors of the company, but surface lines may be constructed or purchased beyond the limits of existing surface lines after consent of the directors has been refused, if the trustees shall determine, after a public hearing, that public necessity and convenience require such construction or purchase: *provided, however*, that if the commonwealth shall elect under the provisions of section twelve to discontinue the public management and operation of the company's property, no such surface lines shall thereafter be constructed or purchased without such consent.

. . . . . .

The trustees shall cause to be paid all amounts which may from time to time become due from the company, and shall declare dividends at the appointed times upon the preferred and common stock of the company, and provide for the payment of the same.

SECTION 4. The stockholders of the company shall, as heretofore, elect a board of directors which shall, however, during the period of public operation, have no control over the management and operation of the street railway system, but its duties shall be confined to maintaining the corporate organization, protecting the interests of the corporation so far as necessary, and taking such action from time to time as may be deemed expedient in cases, if any, where the trustees cannot act in its place. The by-laws of the company shall be modified, as far as may be necessary, to conform to the provisions of this act.

By its acceptance of this act, the company and the stockholders and directors thereof shall be deemed to have assented to and authorized all issues of stock, bonds and other evidences of indebtedness which the trustees may find necessary or advisable during the period of public operation, or which may be required during the period of public operation to carry out any existing or future obligations of the company; but, notwithstanding such assent and authorization, the stockholders and directors shall from time to time take such action with respect thereto as may be requested by the trustees.

Such sum as may be deemed reasonable shall be allowed to the board of directors each year by the trustees to provide for the maintenance of the corporate organization of the company and the performance of such duties as may be necessary by the company and the directors.

SECTION 5. . . . . .

One million dollars shall be set aside as a reserve fund to be used only for the purposes hereinafter specified, and the remaining two million dollars shall be subject to the disposition of the trustees to pay for the cost of additions and improvements to the company's property.

. . . . . .

SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will

reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. Dividends upon the common shares shall be payable quarterly, but no dividends shall be paid upon such common shares in excess of the rates herein specified. The first payment shall be made at the expiration of six months from the commencement of public operation, and the total of the first three quarterly dividend payments shall be five per cent on the par value of the common stock.

. . . . . .

SECTION 8. The reserve fund shall be used only for the purpose of making good any deficiency in income as provided in section nine or for reimbursing the commonwealth as provided in sections eleven and thirteen, and until such use, may be invested in income-producing securities in the discretion of the trustees, and all income or interest received thereon shall be treated as part of the general income of the company.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, and whenever, on the other hand, such income is

more than sufficient to meet the cost of the service, the excess shall be transferred to and become a part of the reserve fund.

. . . . . .

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. If, as of the last day of any June or December thereafter during the period of public operation, the reserve fund shall exceed the amount originally established, the trustees shall apply the excess, so far as necessary, to reimbursing the commonwealth for any amounts which it may have paid to the company under the provisions hereof, and the commonwealth shall thereupon distribute the amount so received among the cities and towns in which the company operates, in proportion to the amounts which they have respectively been assessed as provided in section fourteen.

In order to meet any payment required of the commonwealth under the provisions of this section the treasurer and receiver general may borrow at any time, in anticipation of the assessments to be levied upon the cities and towns, such sums of money as may be necessary to make said payments, and he shall repay any sums so borrowed as soon after said assessments are paid as is expedient.

SECTION 12. Notwithstanding anything contained in this act, the public management and operation of the railway system of the company shall continue after the expiration of

said ten year period upon the terms and conditions herein specified until such time as the commonwealth shall elect to discontinue such public management and operation. The commonwealth shall have the right to terminate such public management and operation, either at the expiration of the said ten year period or at any time thereafter, by appropriate legislation passed not less than two years before the date fixed for such termination.

SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition. If the period of public management and operation expires, control of the property shall then revert to the company, and if at that time the reserve fund shall be less than the amount originally established because the income during the period of public management and operation has been insufficient to pay the cost of the service, the commonwealth shall forthwith pay over to the company an amount sufficient to restore it to its original amount; and if the amount in said reserve fund is then in excess of the amount originally established and any amount required to meet the cost of the service to the expiration of such period, such excess shall be paid into the treasury of the commonwealth and distributed among the cities and towns in which the company operates in the same proportions as the assessments provided for by section fourteen.

SECTION 14. In case the commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be assessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at

the time of said payment, said proportion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose.

SECTION 15. Upon the termination of the period of public management and operation, the company shall manage and operate the property and may fix and collect such just and reasonable fares as will produce an income sufficient to pay the reasonable cost of the service as defined in section six, including dividends upon the common stock from time to time outstanding of six per cent per annum on the par value thereof but no more, and may establish schedules of fares which shall automatically increase or decrease in the same manner as is authorized in the case of the trustees: *provided*, that the commonwealth shall be under no liability to make any payments to the company by reason of any deficiencies in income accruing after the discontinuance of public operation. The company shall thereafter be subject to public regulation and supervision in such manner as may be determined by the general court, but such regulation and supervision shall not be exercised so as to reduce the income below the reasonable cost of the service as defined in this act.

SECTION 16. The acceptance of this act by the Boston Elevated Railway Company shall constitute an agreement upon its part to sell to the commonwealth or any political subdivision thereof at any time during the period of public management and operation its whole assets, property and franchises as a going concern upon the assumption by the commonwealth of all its outstanding indebtedness and liabilities and the payment of an amount in cash equal to the amount paid in in cash by its stockholders for stock then outstanding.

. . . . . .

The provisions of this section shall not preclude the commonwealth or any political subdivision thereof from acquiring the property and franchises of either the Boston Elevated Railway Company or the West End Street Railway Company

at any time through the exercise of the power of eminent domain.

SECTION 18. With the exception of section five, which shall take effect upon the passage of this act, this act shall take effect upon its acceptance by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing of certificates of acceptances with the secretary of the commonwealth, and the filing with the said secretary of a certificate, signed and sworn to by a majority of the directors of the Boston Elevated Railway Company, that the entire three million dollars of preferred stock provided for by section five has been subscribed for, and at least thirty per cent of his subscription has been paid in in cash by each subscriber, and that no dividends have been declared or paid upon the company's common stock since the passage of this act.

None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, which provisions shall constitute a contract binding upon the commonwealth. But if during said period of management and operation the trustees shall be deprived of the possession or control of said property by reason of any action to enforce any debt, claim or obligation which existed at the time the trustees took possession, the commonwealth shall be under no obligation to pay any sum or sums under this act to meet any deficiency in income accruing while the trustees are deprived of such possession and control.

Gen. St. 1919, c. 344, is entitled "An Act to apportion and assess a state tax of eleven million dollars" and provides in part:

SECTION 1. Each city and town in this commonwealth shall be assessed and pay the sum with which it stands charged in the following schedule, that is to say: —

. . . . . .

Boston, three million three hundred forty-eight thousand nine hundred and fifty dollars . . $3,348,950 00

. . . . . .

SECTION 2. The treasurer of the commonwealth shall forthwith send his warrant, according to the provisions of section thirty-four of Part I of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, to the selectmen or assessors of each city and town taxed as aforesaid, requiring them respectively to assess the sum so charged, and to add the amount of such tax to the amount of city, town and county taxes to be assessed by them respectively on each city and town.

SECTION 3. The treasurer of the commonwealth in his warrant shall require the said selectmen or assessors to pay or issue severally their warrant or warrants requiring the treasurers of their several cities and towns to pay to the treasurer of the commonwealth, on or before the fifteenth day of November in the year nineteen hundred and nineteen, the sums set against said cities and towns in the schedule aforesaid; and the selectmen or assessors, respectively, shall return a certificate of the names of the treasurers of their several cities and towns, with the sum which each may be required to collect, to the treasurer of the commonwealth at some time before the first day of September in the year nineteen hundred and nineteen.

SECTION 4. If the amount due from any city or town, as provided in this act, is not paid to the treasurer of the commonwealth within the time specified, then the said treasurer shall notify the treasurer of such delinquent city or town, who

shall pay into the treasury of the commonwealth, in addition to the tax, such further sum as would be equal to one per cent per month during the delinquency from and after the fifteenth day of November in the year nineteen hundred and nineteen; and if the same remains unpaid after the first day of December in the year nineteen hundred and nineteen, an information may be filed by the treasurer of the commonwealth in the supreme judicial court, or before any justice thereof, against such delinquent city or town; and upon notice to such city or town, and a summary hearing thereon, a warrant of distress may issue against such city or town to enforce the payment of said taxes under such penalties as said court or the justice thereof before whom the hearing is had shall order. Nothing herein contained shall be construed to prevent the treasurer and receiver general from deducting at any time the whole or any part of said tax with the interest accrued thereon which shall remain unpaid from any moneys which may be due from the commonwealth to such city or town.

SECTION 5. This act shall take effect upon its passage.

St. 1909, c. 490, Pt. I, §§ 34 and 35, and § 37 as amended by Gen. St. 1918, c. 28, are as follows:

"SECTION 34. When a state tax is to be assessed, the treasurer and receiver general shall send his warrants for the assessment thereof by mail to the assessors of the several cities and towns.

SECTION 35. The assessors shall assess, according to the provisions of this part, state taxes for which they receive such warrants, county taxes duly certified to them, city or town taxes voted by their respective cities or towns and all taxes duly voted and certified by fire and other districts therein.

. . . . . .

SECTION 37. The assessors shall annually assess taxes to an amount not less than the aggregate of all amounts appropri-

ated, granted or lawfully expended by their respective cities or towns since the last preceding annual assessment and not provided for therein, of all amounts which are required by law to be raised by taxation by the said cities or towns during said year, of all amounts necessary to satisfy final judgments against the said cities or towns and of all abatements granted on account of the tax assessment of any year in excess of the overlay of that year, and not otherwise provided for; but such assessments shall not include liabilities for the payment of which cities or towns have lawfully voted to contract debts. The assessors may deduct the amount of all the estimated receipts of their respective cities or towns, except from loans or taxes, which are lawfully applicable to the payment of the expenditures of the year from the amount required to be assessed; but such deduction shall not exceed the amount of such receipts during the preceding year."

ARGUMENT.

I.

Facts showing that the Question before this Court has become Moot may be shown by Affidavit in Support of the Motion to Dismiss.

The motion to dismiss, as has been stated, alleges that the payment and assessment sought to be enjoined have been made and that the tax assessed to the plaintiff in error has been paid; and these allegations are supported by affidavit of the State treasurer. Facts such as these, tending to show that there is no present controversy and that the questions presented by the writ of error have become moot, like jurisdictional matters, may be brought to the attention of the court in any proper manner. In this court affidavits in sup-

port of a motion to dismiss on similar grounds have been accepted.

Little *v.* Bowers, 134 U. S. 547.
Singer Manufacturing Co. *v.* Wright, 141 U. S. 696.
Mills *v.* Green, 159 U. S. 651, 653.
Heitmuller *v.* Stokes, 256 U. S. 359.
Cf. Sullivan *v.* Secretary of the Commonwealth, 233 Mass. 543.

II.

The Motion to Dismiss should be Granted because the Payment and Assessment sought to be Enjoined have been made.

It is a general principle that where there is no actual controversy between the parties involving real and substantial rights, but the case has become moot through the happening of events subsequent to the beginning of proceedings, the court has neither the duty nor the right to make a decision, and the case will be dismissed.

Little *v.* Bowers, 134 U. S. 547, 557.
Singer Manufacturing Co. *v.* Wright, 141 U. S. 696.
California *v.* San Pablo, etc., R. R., 149 U. S. 308.
Mills *v.* Green, 159 U. S. 651.
Richardson *v.* McChesney, 218 U. S. 487.
Wingert *v.* First National Bank, 223 U. S. 670.
United States *v.* Hamburg-American Line, 239 U. S. 466.

United States *v.* American Asiatic S. S. Co., 242 U. S. 537.
Swift & Co. *v.* Hocking Valley Ry. Co., 243 U. S. 281.
Heitmuller *v.* Stokes, 256 U. S. 359.
Cf. Sullivan *v.* Secretary of the Commonwealth, 233 Mass. 543.

The affidavit filed in support of the motion to dismiss shows that the payment by the State treasurer sought by the bill to be enjoined was made by Charles L. Burrill, the then incumbent of that office, on July 24, 1919, which was prior to the filing of the substitute bill of complaint; that on August 14, 1919, said State treasurer notified the assessors of the city of Boston by his warrant, that they were required to assess, in addition to the amount to be assessed for the State tax, and that the city was required to pay, a sum which was the proportionate amount due from it under the act of 1918, with interest, on or before November 15, 1919; and that on that day said amount was paid by the treasurer of the city of Boston under protest. The State tax was payable on or before November 15, 1919, and if not then paid the city was liable for a further sum equal to one per cent per month during the delinquency (Gen. St. 1919, c. 344, §§ 3 and 4). These provisions were clearly applicable to the assessment of which notice was given to the assessors of the city of Boston by the State treasurer, as above stated, under Sp. St. 1918, c. 159, § 14. By St. 1909, c. 490, Pt. I, § 35 and § 37, as amended by Gen. St. 1918, c. 28, which provisions were in force in 1919, the assessors were required to include all State taxes in the amount

of the taxes annually assessed by them. It is to be presumed therefore that the amount paid by the city to the State treasurer has been collected from the taxpayers, and the city's treasury thus entirely replenished.

Manifestly therefore, so far as concerns the payment to the company by the State treasurer and assessment to the city the case has become entirely moot and no ground for controversy remains.

If, however, there were any basis for retaining the bill for other relief, it may be that the motion to dismiss should not be granted.

Clark *v.* Wooster, 119 U. S. 322.
McGowan *v.* Parish, 237 U. S. 285.
Rosen *v.* Mayer, 224 Mass. 494.

But evidently there is no such basis.

(1) The bill does not show that any further payment or assessment is intended or likely to be made, and suit on that ground would be premature.

McCabe *v.* A. T. & S. F. Ry. Co., 235 U. S. 151.
United States *v.* Hamburg-American Line, 239 U. S. 466.
State of Ohio *v.* Cox, 257 Fed. 334, 340, 341.
People *v.* Canal Board of New York, 55 N. Y. 390.

(2) There is no way under the law of Massachusetts by which the payment already made by the city of Boston can be recovered back by it in this suit.

Finley *v.* Boston, 196 Mass. 267.
Welch *v.* Boston, 208 Mass. 326.
Attorney General *v.* East Boston Co., 222 Mass. 450, 452.

International Paper Co. *v.* Commonwealth, 232 Mass. 7, 10.

Cf. Singer Manufacturing Co. *v.* Wright, 141 U. S. 696.

Wingert *v.* First National Bank, 223 U. S. 670.

Furthermore it is apparent that so far as concerns the defendant in error James Jackson the motion to dismiss should be granted because, while by amendment to the bill he has been substituted as a party defendant, no allegations whatever are made regarding him which can constitute a basis for relief against him. It is not alleged that he is threatening or intending to do any act whatever pursuant to the provisions of Sp. St. 1918, c. 159. This court has uniformly held that suits in equity against State officials to enjoin threatened action cannot be revived or continued against their successors in office, in the absence of a State statute authorizing such revival or continuance.

Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 35.

Richardson *v.* McChesney, 218 U. S. 487, 492, 493.

Pullman Co. *v.* Croom, 231 U. S. 571, 577.

Shaffer *v.* Howard, 249 U. S. 200.

Cf. Knights *v.* Treasurer & Receiver General, 236 Mass. 336.

Pullman Co. *v.* Croom and Shaffer *v.* Howard, *supra*, were cases of suits to enjoin the enforcement of taxes.

III.

A Motion to Affirm will be Granted where the Questions raised by Appeal or Writ of Error are Foreclosed by Previous Decisions of this Court.

The proposition stated in this heading has recently several times been announced by this court.

Missouri Pacific Ry. Co. *v.* Castle, 224 U. S. 541, 544.

Cornell Steamboat Co. *v.* Phœnix Construction Co., 233 U. S. 593, 599, 600.

Chicago & Rock Island R. R. *v.* Devine, 239 U. S. 52.

IV.

No Substantial Question is Presented by the Record not Thoroughly Covered by Previous Decisions.

The principal grounds on which the plaintiff in error contends that the act of 1918 should be held unconstitutional may be summarized as follows:

(1) Because its property is taken without just compensation therefor.

(2) Because its rights under previous contracts with the Commonwealth and the company are impaired by the act.

(3) Because the provisions authorizing the assessment of a tax upon the plaintiff in error and the action of the trustees thereunder are arbitrary and unreasonable.

(4) Because the tax authorized to be assessed upon the plaintiff in error was not for a public purpose.

It is submitted that the plaintiff is foreclosed as to the first ground by the construction of the act adopted by the State court to the effect that it neither constitutes nor authorizes the taking of any property belonging to the plaintiff in error.

As to the second ground it is clear, as the Massachusetts court shows in its opinion, that there is no impairment of the obligations of any contract. The only burden placed upon the plaintiff in error by the act is the payment of an assessment, which is made, not because the plaintiff in error has contractual rights in subways and tunnels located within its borders and in the rent therefrom, thereby impairing those rights, but because it is a political subdivision of the Commonwealth occupying territory which is affected by the benefits that the act was intended to confer, and therefore is subjected to its burdens.

Memphis Gas Co. *v.* Shelby County, 109 U. S. 398, 400.

New Orleans City & Lake R.R. Co. *v.* New Orleans, 143 U. S. 192.

St. Louis *v.* United Railways Co., 210 U. S. 266.

The principle that a legislature may enact that the cost of a public undertaking shall be advanced by the State and repaid to it by cities and towns benefited thereby, without their consent, and that the legislature may determine the proportions in which assessments

shall be made or delegate to commissioners the authority and duty to make such delegation, is well established.

County of Mobile *v.* Kimball, 102 U. S. 691, 703, 704.
Williams *v.* Eggleston, 170 U. S. 304, 311.
Houck *v.* Little River District, 239 U. S. 254, 262.
Kingman, petitioner, 170 Mass. 111, 119.
De las Casas, petitioner, 180 Mass. 471, 472.
Chelsea *v.* Treasurer and Receiver General, 237 Mass. 422, 431 *et seq.*

As to the third ground it is submitted that there is nothing in the bill showing that the act of 1918 in its application to the plaintiff in error is arbitrary or unreasonable, or that the action of the trustees thereunder, either in respect to charges for depreciation, maintenance and repairs, or in their method of apportionment, is arbitrary or unreasonable. This it is submitted is clearly shown by the opinion of the Massachusetts court.

County of Mobile *v.* Kimball, 102 U. S. 691, 703, 704.
Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232.
Columbus Southern Ry. *v.* Wright, 151 U. S. 470.
Merchants' Bank *v.* Pennsylvania, 167 U. S. 461.
Williams *v.* Eggleston, 170 U. S. 304, 311.
Travellers' Ins. Co. *v.* Connecticut, 185 U. S. 364, 371.

St. Louis S. W. Ry. *v.* Arkansas, 235 U. S. 350, 367, 368.
Houck *v.* Little River District, 239 U. S. 254, 262.
Dane *v.* Jackson, 256 U. S. 589.

As to the fourth ground, the purpose of the act, as shown by its title and provisions, is to provide for the public operation of the Boston Elevated Railway Company for a period of years, not as a source of profit but solely for the general welfare, and the assessment on the plaintiff in error was made pursuant to the act and in fulfilment of that purpose. Such a purpose, as the State court clearly shows in its opinion, is a public purpose.

The judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect, and its decision declaring a use to be public in its nature will be accepted unless clearly not well founded.

Hairston *v.* Danville & Western Ry. Co., 208 U. S. 598, 607.
Union Lime Co. *v.* Chicago & Northwestern Ry. Co., 233 U. S. 211.
Jones *v.* City of Portland, 245 U. S. 217, 221, 222.

In our Commonwealth taxes for the taking over or support of public enterprises, such as turnpikes, toll bridges, subways, ferries, markets and public baths, have been upheld as an exercise of the power to raise money by taxation for public purposes.

Spaulding *v.* Lowell, 23 Pick. 71.
Murray *v.* County Commissioners, 12 Met. 455.

Central Bridge Corp. *v.* Lowell, 4 Gray, 474.
Attorney General *v.* Boston, 123 Mass. 460.
Prince *v.* Crocker, 166 Mass. 347.
Bolster *v.* Lawrence, 225 Mass. 387.

In the recent case of Green *v.* Frazier, 253 U. S. 233, this court upheld state legislation which provided for engaging the State in the business of manufacturing and marketing farm products and of providing homes for the people, and which appropriated money, created a state banking system and authorized bond issues and taxation for carrying the scheme into effect, as against the contention in an action by taxpayers that the statute in question was unconstitutional under the Fourteenth Amendment.

Cf. Jones *v.* City of Portland, *supra.*

If such legislation as that under review in Green *v.* Frazier does not contravene the Federal Constitution, but may be presumed to rest upon a public purpose, surely an act to provide for the public operation of a street railway, rehabilitation and maintenance of the property, and the levying of taxes for the purposes of the act, is not in violation of the Federal Constitution.

It is submitted that in the special statute of 1918 there is a manifest public purpose, that the statute is not unconstitutional, and that assessments thereunder are valid.

Respectfully submitted,

J. WESTON ALLEN,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 141.

THE CITY OF BOSTON, *Plaintiff in Error,*

v.

JAMES JACKSON, *Treasurer and Receiver General of the Commonwealth of Massachusetts,* JAMES F. JACKSON, SAMUEL L. POWERS *et al., Trustees, etc., et al.*

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF OF THE CITY OF BOSTON RE MOTION OF JAMES JACKSON TO DISMISS OR AFFIRM.

Statement of the Case.

This is a bill in equity brought by the city of Boston, plaintiff in error, against the Treasurer and Receiver General of the Commonwealth of Massachusetts, the Boston Elevated Railway Company, and the trustees operating the company under an act passed by the state legislature in 1918, defendants in error, to determine the validity of certain provisions of this act in so far as they affect the contract and property rights of the city of Boston.

The case involves the question whether the provisions of ch. 159 of the special acts of the Massachusetts legislature of 1918—a law providing for the operation by state trustees (for a period of ten years any-

way, and thereafter until the state elects, by t
passage of a special act, to discontinue public oper
tion) of the property of the Boston Elevated Railw
Company—impair the obligation of certain contra
entered into between the commonwealth of Massach
setts and the city of Boston respecting the constr
tion, ownership, and leasing of certain subways a
tunnels in the city; or deprive the city of its inter
in the rents and profits of said subways and tunn
(or of any other interest therein) without just co
pensation, that is, without due process of law; or de
to the plaintiff the equal protection of the laws; a
are thus invalid under the contract clause of t
Federal Constitution or the Fourteenth Amendme

The bill was sustained by the single justice of t
Supreme Judicial Court who heard the argument
the demurrers of the defendants in the county cou
but the full state court reversed this decision and d
missed the bill. *Boston* v. *Treasurer and Recei*
General, 237 Mass. 403. The case was then taken
writ of error into this court.

One of the defendants in error, the Treasurer a
Receiver General, has now filed a motion to dism
the writ of error on the ground that events occurri
subsequently to the filing of the bill in July, 1919, ha
reduced the issues presented by it to moot questio
and to affirm the decree of the state court on the grou
that the issues raised by the case have been conclu
against the plaintiff in error by prior decisions of t
court.

Inasmuch as the brief of the Attorney General fi
with the motion to dismiss or affirm fails to set fo
the exact nature of the plaintiff's case, the follow

outline of the same is submitted as preliminary to a discussion of the motion on its merits.

The original portion of the Boston subway system, known as the "Tremont Street Subway," was built by the city of Boston under St. 1894, ch. 548, an act which contained no special provisions as to the nature of the city's interest in the structure.

By St. 1897, ch. 500, the legislature made certain changes in the provisions of the earlier act relating to the construction and leasing of the "East Boston Tunnel," which had been authorized by the act of 1894, but had not been built; and upon a taxpayers' petition the Supreme Judicial Court decided, in *Browne* v. *Turner,* 176 Mass. 9 (1900), that the city had no private or proprietary rights in the subway and tunnel that would justify it in claiming an impairment by the legislature of the leases effected or rents reserved under the first act, or in claiming that the act of 1897 was obnoxious to the 14th amendment.

Then in 1902 and 1911, when extensive additions to the subway system were desired, the enabling acts provided in substance that, if the city accepted them, it should borrow the money required for construction and thereupon should "have, hold and enjoy in its private or proprietary capacity for its own property" the subways and tunnels to be built under these acts, and also the subways and tunnels built under the prior acts, and all the "rents, tolls, income and profits from all contracts heretofore or hereafter entered into" for the use of the subways, and that "the same shall never be taken by the Commonwealth except on payment of just compensation". R. p. 5, and *infra,* pp. 24, 27. There were no such provisions in the act of 1894.

The acts of 1902 and 1911 were duly accepted by the city (R. pp. 5-6); and by July 1, 1919, there was an outstanding subway debt incurred by the city of $36,024,700 ($7,699,000 under the acts of 1894 and 1897, and $28,325,700 under the act of 1902 and subsequent legislation). R. p. 6, and Stipulation, *infra*, p. 20.

The contracts or leases for the use of the subways and tunnels were extended under the act of 1911 to July 1, 1936 (R. p. 6), and, besides fixing a definite money rent, provided in substance that all repairs to the leased property should be made by the company and that the latter should maintain the same in good order and condition as complete structures adapted to the maintenance and use of lines of railway; thus placing on the company the full burden of upkeep and depreciation, both physical and functional. R. p. 6.

The rent of the subways for the year ending June 30, 1919, was $1,494,351, while the annual amount due by the city for interest on the outstanding subway debt was $1,396,762. Stipulation, *infra*, pp. 20-21.

In the meantime, by ch. 159 of the Special Acts of 1918, the legislature provided for the operation of the Boston Elevated Railway Company for a more or less indefinite term of years (which might extend far beyond the duration of the leases) by a board of public trustees, made the commonwealth liable for all operating expenses including the subway rentals and also for such expenditures as the trustees chose to make to bring the then depreciated property of a bankrupt corporation (R. pp. 4 and 7-8) into good operating condition, and directed that the deficiency in any year should be made good by assessment upon the cities and towns using the street-railway system. It was, how-

ever, in effect provided in sec. 18 that these provisions should not be binding on the commonwealth. See *infra,* p. 33, and Opinion, R. p. 21.

The first year's operation by the public trustees, that is, for the year ending June 30, 1919, resulted, after paying the ordinary expenses of operation, the subway rentals, and about $2,000,000 for depreciation in large part (R. pp. 4, 23) accrued and existing at the beginning of the period of public control, in a deficiency of $3,980,151 (R. p. 4, and Stipulation, *infra,* p. 16); the proportion of this assessment sought to be collected from the city of Boston under the provisions of the act was $2,905,930 (Stipulation, p. 15); and the proportion of the subway rental of $1,494,351 which was thus to be paid back to the commonwealth amounted to $1,090,876. *Ib.* p. 18.

As the state authorities were about to levy this assessment on the city this suit was brought for the purpose (1) of preventing the Treasurer and Receiver General from collecting this particular assessment, (2) to prevent any similar assessment that might at any future time be made on the city under the act, and (3) to obtain a judicial determination of the constitutionality of certain features of the act, particularly the assessment plan, under the provisions of the state and Federal Constitutions for securing the inviolability of contracts and prohibiting the taking of property without just compensation. The bill (R. pp. 3-9) set out the legislation and most of the facts hereinabove referred to, and also the contentions outlined in the paragraph next but one following.

The defendants demurred, and Mr. Justice Loring, one of the justices of the Supreme Judicial Court, who heard the case in the county court, overruled the de-

murrers (R. p. 3), but reported the case for the determination of the full court, which reversed this decision and dismissed the bill (R. p. 3). Mr. Justice Loring had in the meantime resigned from the bench.

So far as the provisions of the Federal Constitution are concerned the plaintiff, while admitting the general power of the state legislature to take over and operate on public account the property of the Boston Elevated Railway Company either for a limited or for an indefinite period and to assess the cost upon the several communities, including Boston, in the district created or specified in the act, contended in its bill:

First, (as affecting the entire assessment scheme, R. pp. 7-8) that this power could not, without violating the due-process and equal-protection clauses of the 14th amendment, be so exercised as to saddle upon the public the cost of making good the deferred maintenance or depreciation which a private corporation had allowed to accumulate or accrue by paying out in past years for interest and dividends money that should have been applied to maintenance and repairs or used to offset accruing depreciation; and

Secondly, (as affecting the city of Boston in particular, R. pp. 5-8) that the act

a. deprived the city in part of its private or proprietary interests in the subways, or of their rentals (in part at least), without just compensation;

b. impaired the obligation of the contracts created by the acts of 1902 and 1911, as well as the obligation of the leases or contracts made under these acts with the Boston Elevated Railway Company.

As to the first point, the state court finally held (R. pp. 22-24) that the allegations of the bill were not sufficient to take the case out of the principle laid down by the court that it was competent for the legislature to provide for the payment upon public account of the money necessary to rehabilitate the property and to assess the amount among the communities served by the company.

As to the second point, the state court "assumed" (R. p. 24) that the property rights of the city under the acts of 1902 and 1911 were, as alleged by the plaintiff, within the protection of the Constitution and could not be appropriated by the state without reasonable compensation, but went on (R. pp. 25-26) to declare that there was no taking of city property by the state, but merely a contract of operation between the latter and the company, and (R. pp. 26-27) that any deficiency in operation under this contract could lawfully be assessed in part upon the city of Boston notwithstanding the proprietary clauses in these acts, their acceptance by the city, and the issue of $31,000,000 of city bonds upon the faith and credit of them.

The case was brought into this court on August 11, 1921, by writ of error to the Supreme Judicial Court of Massachusetts. It was placed as No. 460 upon the docket for the October, 1921, term of this court, and it now appears as No. 141 on the docket for the October term, 1922. We are informed by the clerk that the case is likely to be reached for argument about the middle of December, 1922.

In the meantime, on August 28, 1922, over twelve months after the entry of the case in this court and

only a short time before the argument on the merits will be reached, one of the defendants in error, James Jackson, filed a motion to dismiss the writ of error and to affirm the decree of the state court.

The grounds of this motion appear to be as follows:

1. The motion to dismiss should be allowed, because the case has become moot by reason of the fact
   a. that Charles L. Burrill, one of the original defendants as Treasurer and Receiver General of the Commonwealth of Massachusetts at the date of filing of the bill, has gone out of office and is no longer a party to the proceedings;
   b. that the tax or assessment, the collection of which the plaintiff sought to enjoin, has in fact been paid: first by the Treasurer and Receiver General to the Boston Elevated Railway Company, and secondly by the city of Boston to the Commonwealth of Massachusetts.
2. The motion to affirm should be allowed, because the questions on which the decision of the case depends are foreclosed by prior decisions of this court.

As bearing on the two grounds of the motion to dismiss, the following facts, arranged chronologically, may be of assistance to the court:

July 16, 1919— Notice by the trustees (dated July 1, 1919) to the Treasurer and Receiver General of a deficiency for the year ending June 30, 1919, of $3,980,151.67.

Motion of defendants in error, p. 5.

July 22, 1919— Substitute bill filed by the plaintiff (R. p. 3).

Neither this bill nor the original bill, evidently filed a few days before, is printed in the record; the bill of July 29, 1919, having been duly substituted.

July 24, 1919— Payment by the Treasurer and Receiver General of the above sum of $3,980,151.67 to the Boston Elevated Railway Company. Motion, p. 6.

July 29, 1919— New substitute bill filed (R. p. 9), being the one printed in the record, pp. 3-9.

August 1, 1919— Demurrer by Charles L. Burrill, Treasurer and Receiver General. R. pp. 9-10.

August 14, 1919— Warrant by the Treasurer and Receiver General to the assessors of the city of Boston requiring them to assess in addition to the amount of the state tax the sum of $2,905,930.87 under the act of 1918 and to issue their warrant requiring the city to pay the said sum on or before November 15th. Motion, p. 7.

September 2, 1919—Demurrer by the trustees. R. pp. 10-11.

September 9, 1919—Demurrer by the Boston Elevated Railway Company. R. p. 11.

September 9, 1919—Interlocutory decree by Mr. Justice Loring overruling the demurrers. R. pp. 11-12.

September 12, 1919—Report of the case by Mr. Justice Loring to the full court. R. p. 3.

November 15, 1919—Payment by the city of Boston to the Treasurer and Receiver General of the amount of the warrant for $2,905,930.87 by check enclosed with a letter stating that "this payment is made by the City of Boston under protest without waiving any of the rights of the City to contest the validity of the assessment and its obligation to pay the same." Motion, p. 8.

January 21, 1920— Expiration of Charles L. Burrill's term as Treasurer and Receiver General of the Commonwealth and succession to the office of Fred J. Burrell. Stipulation, *infra*, p. 16.

September 3, 1920— Resignation of Fred J. Burrell as Treasurer and Receiver General and appointment of James Jackson in his place. Stipulation, p. 16.

At the present time, October, 1922, the office of Treasurer

and Receiver General is still held by the said James Jackson. Motion, pp. 1 and 3.

November 16, 1920—Argument of the case in the full court for the commonwealth. Stipulation, *infra*, p. 17.

At this argument the Attorney General raised the contentions set out above (p. 8) as reasons why the court should dismiss the writ of error and relied on the facts now submitted to this court as set up in the certificates annexed to the motion to dismiss as Exhibits A, B, C, and D. Motion, pp. 5 and 6, and Stipulation, p. 13.

These contentions were ignored by the court, which proceeded to discuss and dispose of the case upon its merits. R. pp. 18 and 27.

February 28, 1921—Decree entered in the Supreme Judicial Court for the Commonwealth overruling the decree by Mr. Justice Loring and sustaining the demurrers. R. p. 12.

The opinion of the court is printed in R. pp. 18-27. On p. 18 it is said that the "amendment is allowed admitting the present Treasurer and Receiver General in place of the one

named in the petition who has vacated that office."

June 11, 1921— Amendment to the bill substituting James Jackson for Charles L. Burrill as one of the parties defendant. R. p. 15.

June 11, 1921— Demurrer of James Jackson to the bill. R. p. 14.

June 11, 1921— Stipulation that the demurrers of the several parties filed in September, 1919, shall be treated as demurrers to the substitute bill of July 29, as further amended by the amendment of June 11, 1921. R. p. 16.

July 11, 1921— Final decree dismissing the bill. R. p. 17.

July 15, 1921— Petition for writ of error, assignment of errors, bond, citation, etc. R. pp. 1-2, and 28-36.

August 11, 1921— Entry of writ of error in this court. R. cover.

August 28, 1922— Motion by the Attorney General of Massachusetts for James Jackson to dismiss or affirm and brief filed in this court.

September 23, 1922—Stipulation filed in this court that the motion to dismiss or affirm shall be submitted to the court for its decision on November 6, 1922.

October 16, 1922— Stipulation filed respecting the proceedings in the state court, printed *infra*, pp. 13-21.

Stipulation, filed October 16, 1922, relative to Papers submitted to the Supreme Judicial Court of the Commonwealth of Massachusetts.

It is hereby stipulated between the City of Boston, plaintiff in error in the above cause, and James Jackson, Treasurer and Receiver General of the Commonwealth of Massachusetts, James F. Jackson, Samuel L. Powers, Stanley R. Miller, John F. Stevens and Winthrop Coffin, as they are trustees of the Boston Elevated Railway Company, and Boston Elevated Railway Company, defendants in error, as follows:

On November 16, 1920, at the argument before the Supreme Judicial Court of the Commonwealth of Massachusetts, the Attorney General in behalf of the Treasurer and Receiver General offered for filing a certificate of the Treasurer and Receiver General and a certificate of the Secretary of the Commonwealth. Copies of said certificates are hereto annexed, marked "Exhibit A" and "Exhibit B", respectively. The Attorney General contended before the Supreme Judicial Court that the facts set forth in said certificates made the question presented by the case a moot one. The Attorney General, in his brief and oral argument also contended before the Supreme Judicial Court that, in so far as the bill seeks to enjoin possible future assessments, the suit was wholly premature, pointing out that there might never be another deficiency under the act. After the argument counsel for the City of Boston submitted on November 22, 1920 to the Chief Justice of the Supreme Judicial Court a letter, a copy of which is hereto annexed, marked "Exhibit C."

CITY OF BOSTON,

Nathan Matthews,
Of Counsel.

By E. Mark Sullivan,
Corporation Counsel.

JAMES JACKSON,
Treasurer and Receiver General,
By J. Weston Allen,
Attorney General.

BOSTON ELEVATED RAILWAY COMPANY,
By Gaston, Snow, Saltonstall & Hunt.

JAMES F. JACKSON, SAMUEL L. POWERS, STANLEY R. MILLER, JOHN F. STEVENS and WINTHROP COFFIN, as they are trustees of the Boston Elevated Railway Company, duly appointed under the provisions of Spec. St. 1918, c. 159.
By H. Ware Barnum.

EXHIBIT A.

BOSTON, November 12, 1920.

I, James Jackson, Treasurer and Receiver-General of the Commonwealth of Massachusetts, hereby certify that the following facts are shown by the books, papers, documents and records of the Treasury Department of the Commonwealth:

On July 16, 1919, Charles L. Burrill, Treasurer and Receiver-General, was formally notified by the Trustees of the Boston Elevated Railway Company, in accordance with section 11 of Chapter 159 of the Special Acts of 1918, that the amount of the deficiency mentioned in section 9 of said Act, less the amount in the reserve fund applicable thereto, was $3,980,151.67. A copy of said notice, dated July 1, 1919, is hereto annexed, marked "Exhibit A."

On July 24, 1919, the amount above stated was paid by said Burrill, as Treasurer and Receiver General, to the Company.

On August 14, 1919, said Burrill as Treasurer and Receiver General notified the City of Boston of the proportionate amount due from it under section 14 of said Act; namely, $2,905,930.87.

On *November 15, 1919,* said amount was paid by the Treasurer of the City of Boston under protest.

(Signed) JAMES JACKSON
Treasurer and Receiver-General.

SUFFOLK, ss. BOSTON, MASS., November 12, 1920.
(Seal)

Then personally appeared the above named James Jackson and made oath that the above statement by him subscribed is true to the best of his knowledge and belief. Before me,

(Signed) GEORGE B. WILLARD
Notary Public

(Letterhead of Boston Elevated Railway Company.)

BOSTON, July 1, 1919.

HON. CHARLES L. BURRILL,
Treasurer and Receiver-General,
State House, Boston, Mass.
Sir:—

The Trustees of the Boston Elevated Railway Company, under the provisions of Chapter 159 of the Special Acts of 1918, hereby notify you as Treasurer and Receiver-General of the Commonwealth, in accordance with Section II of said Acts: That as of the last day of June in the year Nineteen Hundred and Nineteen, the income of the Company during the period since said Trustees began to manage and operate the Company, as provided in Section 2 of said Act, has been insufficient to meet the cost of the service as de-

fined in said Act by the amount of Four million nine hundred eighty thousand one hundred fifty-one dollars sixty-seven cents ($4,980,151.67) that the amount of the reserve fund applicable thereto is One Million Dollars; and that the amount of such deficiency less the amount in the reserve fund applicable thereto is Three million nine hundred eighty thousand one hundred fifty-one dollars sixty-seven cents ($3,980,151.67).

(Signed) James F. Jackson
" Sam'l L. Powers
" Stanley R. Miller
" John F. Stevens
" Winthrop Coffin
Trustees of the Boston Elevated Railway Company

Exhibit B

The Commonwealth of Massachusetts
Office of the Secretary

Boston, November 12, 1920.

This is to certify that Charles L. Burrill is not now and has not been Treasurer and Receiver General of the Commonwealth since January 21, 1920, his term of office having expired on that date; that Fred J. Burrell, having been duly elected to the office of Treasurer and Receiver General, did on January 21, 1920 take and subscribe the oaths qualifying him for the duties of said office; that said Fred J. Burrell on the 3d day of September, 1920, resigned from said office; that James Jackson was duly appointed in his place, and is now Treasurer and Receiver General of this Commonwealth.

Witness The Great Seal of the Commonwealth

(Seal)

Herbert H. Boynton
Deputy, Acting Secretary of the Commonwealth

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. EQUITY No. 1331

CITY OF BOSTON

v.

CHARLES L. BURRILL *et al*

To the HON. ARTHUR P. RUGG,

Chief Justice of the Supreme Judicial Court:

Sir:—

At the close of the argument November 17th the court inquired of counsel for the plaintiff what the exact property was which the plaintiff complained had been taken under the act of 1918.

Counsel replied in general terms that it was the rent or annual value of the subways to the extent that the special tax levied upon the city represented or included such rent or value. It was impossible upon the pleadings or the facts stated in the report to give the exact figures.

Upon looking over the affidavits which the court allowed the Attorney General to file at the commencement of the argument on November 18th counsel find that the affidavit of James Jackson, the present Treasurer and Receiver General of the Commonwealth states the amount of the deficit for the fiscal year 1918-19 as $3,980,151.57, and the amount of the assessment or special tax upon the City of Boston as $2,905,930.87.

In order to answer the question of the court in dollars and cents all that is needed to supply is the amount due to the city during the said fiscal year for the subway rentals and the amount due by the city for

interest. The plaintiff asks the court to receive the annexed affidavit of the City Auditor of the City of Boston, showing that these amounts were, respectively, $1,494,351.79 and $1,396,762.

If this request is granted figures will be before the court from which it will appear that the proportion of the total deficit assessed upon the plaintiff was 73.01%; which means that 73% of the subway rentals for the year in question, namely the sum of $1,090,876, had to be paid back by the City of Boston to the Commonwealth under the special tax.

The claim of the plaintiff briefly stated is, therefore, that the effect of the act of 1918 was to deprive the plaintiff for the fiscal year 1918-19 of the sum of $1,090,876 which had been secured to it by the acts of 1902 and 1911 as its private property never to be taken or impaired by the state except for adequate compensation.

That no compensation in fact was received by the city, or could be received, under the act of 1918 for this $1,090,876 of rent can be illustrated by the following comparison:

If the subways had been owned by the Boston Elevated Railway Company and the use of them had been taken over by the state upon an agreement to pay the company the sum of $1,494,351 per annum, and the assessment features of the act were the same as those actually enacted, the city would have been assessed the sum of $2,905,930. It would have received nothing by way of rent and it would, therefore, be out of pocket the said sum and no more. Under the actual circumstances of the case the city pays the same sum, $2,905,930; but it receives $1,494,351 as rent. This

receipt, however, is practically offset by the fact that, having paid for the subways by borrowed money the city has to pay interest on the debt, amounting to $1,396,762. In either case the city and its inhabitants get whatever general benefit the legislature may have assumed would follow the continued operation under state control of the street railway system; and nothing can be considered as a special benefit to the city from one scheme which would not be enjoyed under the other. Under the scheme actually adopted the city receives $1,494,351 from the company or trustees, pays $2,905,930 to the state, and pays $1,396,762 to the holders of the bonds; the net result being an annual cost to the city of $2,808,341 or within $97,589 as much as if it had never agreed to pay for the subways under the acts of 1902 and 1911.

Assuming (for argument) that the act is not unconstitutional for any of the reasons set out in Part C. 3. of the plaintiff's brief (pp. 40-45), and assuming further that so much of the special tax of $2,905,930.47 as represents losses in operation is valid, the plaintiff contends (as argued in its brief under C. 4. pp. 46-49) that the act is nevertheless unconstitutional as to that part of this tax, namely, $1,090,876, which represents the city's share of the subway rentals, which are incorporated in the expenditures of the company or trustees and are reflected in the deficit. The result is exactly the same as if the city had not built the subways, did not own them, did not owe $36,024,700 for them, and did not have to pay the interest on this debt. The effect of the act is thus to destroy or take without compensation $1,090,876 of the "rents, tolls, income and profits" of the subways contracts which

interest the legislature declared and promised, in consideration of the city's accepting the act and borrowing the money required to build the subways ($28,916,700), should "never be taken by the Commonwealth except on payment of just compensation."

Respectfully submitted,

(Signed) ARTHUR D. HILL
Corporation Counsel

(Signed) NATHAN MATTHEWS
Of Counsel

Copies of this letter and affidavit have been sent to counsel for the several defendants.

BOSTON, November 19, 1920.

I, J. Alfred Mitchell, City Auditor of the City of Boston, hereby certify that the following facts are shown by the books, papers, documents and records of the City of Boston.

1.—On July 1, 1919 the outstanding debt incurred by the city for the construction of subways and tunnels under ch. 548 of the acts of 1894 and ch. 500 of the acts of 1897 was $7,699,000; the total amount of such debts outstanding on said date incurred under ch. 534 of the acts of 1902 and subsequent legislation was $28,325,700; and the total amount of subway and tunnel debt outstanding on said July 1, 1919 was $36,024,700.

2.—The annual amount due by the City of Boston for interest on said debt of $36,024,700 was $1,396,762.

3.—The accruals or amounts due for the twelve months ending June 30, 1919 for the rent or

use of said subways and tunnels under the contracts relating thereto was $1,494,351.79.

(Signed) J. Alfred Mitchell
City Auditor of the City of Boston

Suffolk, ss. Boston, Mass. November 19, 1920.

Then personally appeared the above J. Alfred Mitchell and made oath that the above statement by him subscribed is true to the best of his knowledge and belief.

Before me,

(Signed) Carl H. Baesler,
Justice of the Peace

My commission expires Sept. 30, 1926.

State Statutes Relied On.

STAT. 1902, CH. 534: AN ACT TO PROVIDE FOR THE CONSTRUCTION OF ADDITIONAL TUNNELS AND SUBWAYS IN THE CITY OF BOSTON.

SECTION 1. The Boston transit commission, hereinafter called the commission, may construct in the city of Boston, hereafter called the city, a system of tunnels and subways so designed as to be adapted for the accommodation of two tracks especially for use by surface cars, from a point or points near the junction of Broadway and Washington street or within one thousand feet therefrom, through and under public streets, squares or places and public or private lands, between the existing subway and a line parallel with and seven hundred and fifty feet easterly from Washington street to the line of Court and State streets, and thence northerly by such route as may be deemed best, to a point or points in or near Adams square, Haymarket square or Causeway street, together with approaches, sidings, entrances, stations, elevators, inclines, connections and other structures, hereinafter called appurtenances, which shall also include connections either at grade or otherwise with the East Boston tunnel and the existing subway.

The structure for the two tracks especially adapted for elevated cars or trains, hereinafter called the tunnel, shall be begun immediately after the acceptance of this act by a majority of the voters of the city as hereinafter provided. The structure for the remaining two tracks, hereinafter called the subway, shall be begun at such time after the expiration of one year from the completion of the tunnel as the commission and the Boston Elevated Railway Company, herein-

after called the company, may agree upon, or, in case of difference, as the board of railroad commissioners, hereinafter called the board, shall determine that the public interests require. The structure or structures for all four tracks, with the appurtenances, or any part or parts thereof, may be begun at any time after the acceptance of this act by a majority of the voters of the city as hereinafter provided, if and so far as the commission deems it expedient and if the company by its board of directors consents thereto.

* * * * * * * * * *

Section 10. The commission shall within ninety days after the passage of this act execute with the company, in the name of the city, the company consenting thereto, a contract in writing for the sole and exclusive use of the tunnel and subway and appurtenances for the period of twenty-five years from the beginning of the use of the tunnel, at an annual rental equal to four and one half per cent of the net cost of the tunnel and subway, respectively, for the running of trains and cars therein, and for such other uses and upon such provisions and conditions, not affecting the term or rental, as the commission and the company may agree upon, or in case of difference, as the board may determine * * *.

Section 16. The treasurer of the city shall from time to time, on request of the commission, issue and sell at public or private sale, the bonds of the city, registered or with interest coupons attached, as he may deem best, to an amount not exceeding the cost of the tunnel and subway herein provided for. Such bonds shall be designated on their face, Boston Tunnel and Subway Loan, shall be for such terms, not exceeding

fifty years, as the mayor and treasurer of said city may determine, and shall bear interest payable semi-annually at such rate not exceeding four per cent per annum, as the treasurer shall determine. The debts incurred by the city from time to time under the provisions of this act shall not be included in determining the limit of indebtedness of the city as established by law, and the proceeds of such bonds shall be used to meet all damages, costs and expenses incurred by the commission or the city in carrying out the provisions of this act. * * *

SECTION 18. The supreme judicial court and the superior court, upon application of any party in interest, including the city or any ten taxable inhabitants thereof, may enforce or prevent violation of the provisions of this act by any appropriate process.

SECTION 19. If the contract for the use of the tunnel and subway is executed by the commission and the company as hereinbefore provided, this act shall be submitted for acceptance to the voters of the city at the next municipal election, and if accepted by a majority of those voting thereon at such election it shall thereupon take full effect. The city shall have, hold and enjoy in its private or proprietary capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge street subway and the tunnel and subway built under this act, and all rents, tolls, income and profits from all contracts heretofore or hereafter entered into for the use of said subways or tunnels or any part thereof, and the same shall never be taken by the Commonwealth except on payment of just compensation: *provided, however,* that so much of such rents, tolls, income and profits as may

be necessary therefor shall be paid into the respective sinking funds for the redemption of said bonds and used for the payment of the interest thereon.

STAT. 1911, CH. 741: AN ACT RELATIVE TO ELECTRIC RAILWAY TRANSPORTATION FACILITIES IN THE CITY OF BOSTON AND ITS VICINITY.

Part I.

Relative to the Construction of Additional Tunnels or Subways in the City of Boston.

Dorchester Tunnel.

SECTION 1. The Boston transit commission (hereinafter called the commission) shall construct in the city of Boston (hereinafter called the city) a tunnel (hereinafter called the Dorchester tunnel) designed to contain two railway tracks connecting with the tracks in the Park street station of the Cambridge connection, so-called, under Boston Common and Tremont street, and being an extension of said Cambridge connection, forming a continuous route therewith and running under Winter and Summer streets to Dewey square, and thence by such route as may be approved by the commission, to a point at or near the junction of Dorchester avenue and Broadway in South Boston; thence in, under or near Dorchester avenue to a point in, at or near Andrew square in Dorchester, together with stations at or near the corner of Washington street and Summer street, at or near the South station, at or near the corner of Broadway and Dorchester avenue, and in, at or near Andrew square, and passageway connections with the Tremont street subway and Washington street tunnel and the South station; and the commission in connection therewith may make

such alterations or enlargements of the present Park street station of the Tremont street subway, and of the exits and entrances from and to such station, and of the station now being constructed at or near the junction of Park and Tremont streets for the tunnel of the Cambridge connection, so-called, and of the exits and entrances therefrom and thereto, as the commission may deem necessary or advisable.

* * * * * * * * * *

SECTION 3. Within the time and upon the terms specified in Part II of this act, the commission, in the name and on behalf of the city of Boston, and the company, shall execute a contract in writing for the sole and exclusive use of the tunnel by the company for the running of its cars therein, and for such other uses as the commission and the company may agree upon, for a term of years and at an annual rental as specified in Part II of this act, and upon such other provisions and conditions not affecting the term or rental, and following the form of the contract made by and between the city, acting by the commission, and the company for the use of the Washington street tunnel, so far as the same may be applicable, as the commission and the company may agree upon, or, in case of difference, as the board may determine * * *.

SECTION 4. The treasurer of the city of Boston shall from time to time, on request of the commission, issue and sell at public or private sale the bonds of the city, registered or with interest coupons attached, as he may deem best, to an amount not exceeding the cost of the tunnel provided for by section one of this act. Such bonds shall be designated on their face "Dorchester Tunnel Bonds"; shall be for such terms

not exceeding forty-five years, as the mayor and treasurer of the city may determine; and shall bear interest payable semi-annually, at such rate, not exceeding four per cent per annum, as the treasurer shall determine. The proceeds of such bonds, including any premiums realized from the sale thereof shall be used to meet all damages, costs and expenses incurred by the commission or by the city in carrying out the provisions of this act for the construction of the Dorchester tunnel. The proceeds from any sale or sales of lands or rights taken, or acquired by purchase or otherwise under authority of this act for the construction of said tunnel shall be used for the same purpose as the rentals of said tunnel, or shall be used for the payment of expenditures incurred for construction, as the commission may determine. All rentals, tolls, percentages or other annual compensation received by the city for any use of the tunnel under this act, or for any use of any lands or rights acquired under the provisions of this act for the Dorchester tunnel shall be used in the first instance for the payment of interest on the bonds issued for the cost of said tunnel, and the balance shall be used for the purposes specified in Part II of this act. Any interest received by the city upon the proceeds of the bonds prior to the expenditure of such proceeds shall be credited against interest during construction in ascertaining the net cost of the tunnel. The city shall have, hold and enjoy in its private or proprietary capacity, for its own property, the said tunnel and subway and all rents, tolls, income and profits from all contracts entered into by it for the use of said subway or tunnel or any part thereof, and the same shall never be taken

by the commonwealth except on payment of just compensation.

Sections 5 to 9 contain similar provisions respecting the "Boylston Street subway."

Sections 10 to 13 contain similar provisions respecting the "East Boston Tunnel Extension."

SECTION 26. The supreme judicial court and the superior court, upon application of any party in interest, including the city, the commission, the company or any ten taxable inhabitants of the city, may enforce or prevent violation of the foregoing provisions of this act by any appropriate process.

Part II.

Relative to Contracts for the Use of Subways and Tunnels within the City of Boston.

SECTION 27. The contract for the use of the Tremont street subway, so-called, shall be extended for a term beginning with the expiration of said present contract and ending on the first day of July, nineteen hundred and thirty-six, upon the same terms and conditions stated in said existing contract, except as is otherwise provided herein. The rental, from and after the expiration of the present contract, shall be a sum equal to four and one half per cent per annum on the net cost of said Tremont street subway.

Sections 28 to 33 inclusive contain similar provisions for the other subways and tunnels.

SECTION 38. Within ninety days after this act takes full effect the commission, acting on behalf of the city of Boston, and the Boston Elevated Railway Company shall execute a contract upon the terms and conditions

hereinbefore prescribed for the use of the proposed Dorchester tunnel authorized by section one of this act; and shall likewise, within the same period, execute a contract upon the terms and conditions hereinbefore stated for the use of the proposed Boylston street subway authorized by section five of this act; and shall likewise, within the same period, execute a contract upon the terms and conditions hereinbefore prescribed for the use of the proposed East Boston tunnel extension authorized by section ten of this act; and shall likewise, within the same period, execute a contract for the use of the tunnel of the Cambridge connection, so-called, upon the terms and upon the conditions hereinbefore prescribed, unless such contract has already been executed upon the terms and upon the conditions prescribed by law at the date of such execution, and, in case such contract has already so been executed, shall execute alterations of the same, readjusting the terms and conditions thereof so as to conform to the terms and conditions prescribed in this act; and shall likewise, within the same period, execute extensions of the existing contracts for the use of the Tremont street subway, of the East Boston tunnel, and of the Washington street tunnel, all upon the terms and upon the conditions hereinbefore prescribed.

* * * * * * * * * *

Section 41. Section fourteen of Part I of this act shall take effect upon its passage. The remaining provisions of this act shall not take effect until it shall have been accepted both by vote of the city council of the city of Boston, approved by the mayor, and by the Boston Elevated Railway Company by vote of its board of directors * * *.

Section 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall * * * serve for the term of ten years from the date when they assume the management of the company as hereinafter provided and until their successors are duly appointed and qualified * * *.

If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor trustees to serve for a period of ten years, and until their successors are appointed and qualified, but not exceeding the period of public management and operation. * * *

Section 2. Said board of trustees, hereinafter called the trustees, shall manage and operate the Boston Elevated Railway Company hereinafter called the company, and the properties owned, leased or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and subject to the provisions of this act, shall take and have possession of said properties in behalf of the commonwealth during the period of public operation * * *.

Section 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the

cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. * * *

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. * * *

In order to meet any payment required of the commonwealth under the provisions of this section the treasurer and receiver general may borrow at any time, in anticipation of the assessments to be levied

upon the cities and towns, such sums of money as may be necessary to make said payments, and he shall repay any sums so borrowed as soon after said assessments are paid as is expedient.

SECTION 12. Notwithstanding anything contained in this act, the public management and operation of the railway system of the company shall continue after the expiration of said ten year period upon the terms and conditions herein specified until such time as the commonwealth shall elect to discontinue such public management and operation. The commonwealth shall have the right to terminate such public management and operation, either at the expiration of the said ten year period or at any time thereafter, by appropriate legislation passed not less than two years before the date fixed for such termination.

SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition. * * *

SECTION 14. In case the commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be assessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of said payment, said propor-

tion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose.

SECTION 18. * * *

None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, which provisions shall constitute a contract binding upon the commonwealth. But if during said period of management and operation the trustees shall be deprived of the possession or control of said property by reason of any action to enforce any debt, claim or obligation which existed at the time the trustees took possession, the commonwealth shall be under no obligation to pay any sum or sums under this act to meet any deficiency in income accruing while the trustees are deprived of such possession and control.

GEN. LAWS, 1921, CH. 231: PLEADING AND PRACTICE; SEC. 51, AMENDMENTS.

The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defence.

I. Argument on the Motion to Dismiss.

The basis for this motion is the contention that the case has become moot because (1) Charles L. Burrill, the Treasurer and Receiver General named as one of the defendants in the original bill, has ceased to hold that office, (2) the tax in dispute has been paid, and (3) no relief is asked against James Jackson, the present Treasurer and Receiver General, substituted for Burrill as a party defendant.

(*1*) *The fact that Charles L. Burrill, defendant to the original bill as Treasurer and Receiver General, has ceased to hold that office is met by the amendment allowed by the state court substituting James Jackson, the present incumbent of the office, as a party defendant.*

This amendment to the bill was assented to by the counsel for all the parties defendant, including the Attorney General (R. p. 15), and was allowed by the state Supreme Judicial Court for the Commonwealth (*supra*, p. 12) on the day, June 11, 1921, on which the case was finally decided by that court (R. p. 17), which was two months before the case was entered in this court, on August 11, 1921. *Supra*, p. 12.

No decision of this court can, we think, be cited in which jurisdiction has been denied on a state of facts like the above.

The recent case of *Irwin* v. *Webb*, Adv. Opinions 1921-22, p. 333, decided March 20, 1922, goes as far as any to support the contention of the Attorney General; but in that case the retirement of the officials originally made defendants did not take place until after the case had reached the Supreme Court and had been sub-

mitted on briefs (see p. 335), and the court was unable to find any statute in the state in which the controversy arose which would permit the substitution as parties defendant of the new incumbents of the offices in question. See pp. 335-336.

In the case at bar there is a state statute (Mass. R.L. 1902, ch. 173, sec. 48, and G.L. 1921, ch. 231, sec. 51), which gives the court broad powers to "allow amendments introducing a necessary party, discontinuing as to a party or changing the form of action," etc., etc. (see *supra*, p. 33); and this power was exercised by the state court before the case passed beyond its jurisdiction, and after the Attorney General had raised in that court the point now relied on in this court. When the case came into this court, Burrill had already ceased to be a party, and Jackson had already been made one.

The action of the state court in this matter is submitted to be conclusive.*

It may also be suggested that if, as contended by the Attorney General (Motion, p. 29), there is no legal way for the city to recover the tax from the commonwealth if it was illegally assessed, and if the rule in *Irwin* v.

*The action of the Massachusetts Court in this case is not inconsistent with *Knights* v. *Treasurer and Receiver General*, 236 Mass. 336; for that was a case of mandamus, and as soon as the defendant ceases to hold the office he becomes unable to execute the writ. Even if (as we deny) there would seem to be some inconsistency between the decision in this case and the allowance of the amendment in the case at bar, it should be noted that the Knights case was decided on October 13, 1920, one month before the argument in the case at bar and about eight months before the allowance of the amendment to the bill in the pending suit. This action of the state court in the case at bar must therefore be regarded either as a reversal for the purposes of this case of *Knights* v. *Treasurer and Receiver General*, etc., or (as we prefer to think) as a recognition of the inapplicability of that decision to the present case.

Webb is to be stretched to cover a case like the present, then, whenever a tax official levies an unconstitutional tax within a few months of the expiration of his term of office, there is, by reason of the impossibility of reaching this court in time, no remedy at all, and the constitutional rights of the property owner are rendered ineffectual by the very court created to secure them.

(*2*) *The payment of the tax for 1919 by the city is immaterial.*

The Attorney General argues (Motion, pp. 26-29) that, because the assessment for 1919 specifically objected to in the bill has been paid by the plaintiff, the case has become moot and should be dismissed. He says (Motion, p. 29) that "so far as concerns the payment to the Company by the State Treasurer and assessment to the city the case has become entirely moot and no ground for controversy remains." With the payment of the commonwealth funds to the company we are not concerned, but we assume that the Attorney General meant to include or rely on the payment by the city to the Treasurer and Receiver General of the amount assessed by him on the city and alleged by the latter to be (in part at least) illegally assessed.

The main authority for the proposition that the payment of the tax renders a suit to contest its validity moot is doubtless the case of *Singer Mfg. Co.* v. *Wright,* 141 U.S. 696; but it will be found, we think, that the few cases in which this court has adopted this rule were either appeals from or writs of error to lower federal courts or writs of error to state courts

in cases where the payment was made after the writ of error was sued out in this court. In the case at bar the payment was made while the case was pending in the state court, almost exactly a year before it was argued in the full court, and over a year before the final decision by that court came down. This very question of payment was before the state court, which nevertheless concluded to consider and decide the case upon its merits. It would seem that if payment was a bar to equitable relief in a case like this the state court would have seized upon this fact; and that, this not having been done, there is no reason why the Supreme Court of the United States should dismiss the suit on the ground of a preliminary matter which the state court did not think of sufficient consequence to decide.

Equity jurisdiction is largely a question of state policy and practice; and when a case comes to this court from a state court, it is not the practice of this court to throw it out in reliance upon a preliminary objection which might have been taken by the state court, but which after consideration was not so taken. See

Bi-Metallic Co. v. *Colorado*, 239 U.S. 441.

This was a suit brought into this court by error to the Supreme Court of Colorado to enjoin a state board from putting a tax order in force. It was held, both by the state court and by this court, that the tax order was valid; but the contention of the defendant in error that the case should be dismissed because the plaintiff in error had an adequate remedy at law was rejected, the court saying, p. 444, in an opinion by Mr. Justice Holmes:

> "The allowance of equitable relief is a question of state policy and that as the Supreme Court of the State treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground."

Inasmuch as the case at bar was decided by the state court on its merits, notwithstanding the payment in question, the plaintiff in error believes and hopes that this court will do the same.

Even if this suggestion does not find favor with the court the payment of the assessment by the city is not a valid ground for dismissing the writ of error unless the scope of the bill of complaint and of the relief prayed for was limited to this particular assessment.

This is admitted by the Attorney General, but he contends that there is "evidently" no basis for retaining the bill for other relief. Motion to dismiss, p. 29. Now it is so "evident" from the bill itself that it was not confined, either in the stating or the charging part or in the prayer, to relief against the assessment for 1919 that we suspect that the Attorney General had in mind one of the earlier bills which were superseded by the amended bill of July 29, rather than the bill of that date, which is the only one before the court.

The substitute bill of September 29, 1919, not only alleges that this particular assessment violates the constitutional rights of the city and that the collection of it should therefore be enjoined, but objects generally (R. p. 8) to the provisions of the act of 1918 which permit the trustees at any time to expend public money to make good accrued depreciation, to pay fixed divi-

dends on the company's stock from time to time outstanding throughout the whole period (ten years at least) of public operation, and to turn the property back to the company at the end of public control in good operating condition, that is, with all past depreciation as well as dividends made good at public expense. And the prayer of the bill (R. p. 9) is for an injunction against the trustees from determining and certifying the amount of any future deficiency, and a perpetual injunction against the Treasurer and Receiver General from assessing on or collecting from the city any part of any sum that may hereafter be paid by the commonwealth to the company to make good such future deficiency. There is also a prayer for general relief.

These allegations and prayers are not confined to the assessment for 1919, but are general in terms and apply to any and every attempt that may be made by the trustees for the time being to create, determine, or apportion the deficiency, and to every attempt that may be made by the Treasurer and Receiver General for the time being to assess and collect from the city.

The main object of the bill is to secure a determination of the validity of assessments, past or future, on the city of Boston under the act, and if the court should hold the same to be invalid (in part or wholly), no future assessment could be made or collected of the part declared to be invalid. And that this was the understanding of the state court is shown by the fact that it proceeded to determine this general question, regardless of the payment of the tax for 1919 a year before the argument.

Applying the words of this court in *Bi-Metallic Co.* v. *Colorado* (*supra*, p. 38), there is no reason why the Supreme Court of the United States should now "speculate whether the state court might or might not have thrown out the suit on the preliminary ground."

Attention may also be called to section 18 of the act of 1902 (*supra*, p. 24) and to section 26 of the act of 1911 (*supra*, p. 28), which specifically give to the city of Boston the right to appeal to the Supreme Judicial Court for the enforcement or to prevent the violation of the provisions of these laws by any appropriate process.

(*3*) *The fact that the bill does not allege that the present Treasurer and Receiver General is about to levy an illegal tax* (*other than that for 1919*) *is immaterial.*

The Attorney General is driven to contend (Motion, p. 29) that the bill should be dismissed because it contains no specific allegation that any further assessment is "intended or likely to be made." The question is whether any such allegation was necessary to secure a determination by the court of the general liability of the city for assessments under the act.

We are not aware of any decisions of this court that contain an affirmative answer to this question.

It is not required as a condition of relief by injunction against action by public authorities under an unconstitutional statute that the complainant allege and prove that the public authorities are threatening to act under the statute. It is enough that the statute has been enacted and that under its terms the public authorities are required or directed to take action

which will impinge upon the constitutional rights of the complainant.

Thus in

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U.S. 65

it appeared that the complainant had certain rights under its franchise, but the legislature enacted a statute and city council passed an order under it, the carrying out of which would have destroyed the rights of the complainant under its franchise. It was not alleged that the city had done or had threatened to do anything actually interfering with complainant's rights. The court said, p. 82:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city council cannot be the basis of enjoining such action."

It was held nevertheless that the injunction should issue.

In

Raymond v. *Chicago Traction Co.*, 207 U.S. 20

it was held that the Circuit Court had jurisdiction to enjoin the collection of a tax where it was alleged in the bill that an unconstitutional tax had been assessed, and that under the statutes it was the duty of the collector to collect the tax by levy on the complainant's property, although it was not alleged that the collector was threatening to collect the tax.

Other cases illustrating the same principle include

Hills v. *Exchange Bank*, 105 U.S. 319.
Bank of Kentucky v. *Stone*, 174 U.S. 799; affirming a decision by Taft, J., in 88 Fed. 383.

When the court has jurisdiction originally, it should be retained for all purposes, if for no other reason than to prevent a multiplicity of suits, even in cases where the remaining questions would by themselves be the proper subject of an action of law.

Camp v. *Boyd*, 229 U.S. 530, 551-552.
McGowan v. *Parish*, 237 U.S. 285, 296.

In both cases the court states that "a court of equity ought to do justice completely and not by halves." See also

Rosen v. *Mayer*, 224 Mass. 494, 495-496.

(4) *The motion to dismiss should be denied because of the delay in filing it.*

While a motion to dismiss may be considered by this court at any stage of the proceedings, the failure of the defendants in this case to file the motion until a year after the entry of the writ of error in this court, and the fact that the argument of the case upon its merits is only a few weeks distant, may well induce the court to postpone the consideration of both motions until the whole case is argued next December. At that time arguments can also be presented in support of the motion to dismiss.

II. Argument on the Motion to Affirm.

The Attorney General contends (Motion, p. 2) that the final decree of the state court should be affirmed on the ground that the points raised by the writ of error are foreclosed by prior decisions of this court, that is (*Ib.* p. 31), that no substantial question is presented by the record not thoroughly covered by previous decisions.

This motion seeks to commit the court to a decision of what the state court said (R. p. 18) is a case of "great public importance" without full argument, and ignores the fact that all the federal issues raised in the state court are before this court except such as may have been eliminated by the construction of the act of 1918 adopted by the state court.

(1) *The rights of the plaintiff in error in the subways, their rents, and leases.*

No case presenting similar issues has yet come before this court for actual decision. There have been many decisions in the state courts that property owned by a municipal corporation in its private or proprietary capacity is as much within the protection of the contract clause and the 14th amendment as if it belonged to an individual citizen, and that all legislative interference with such property or its use or profits is unconstitutional. The leading case in support of this principle of constitutional law is probably *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, which applies this doctrine to a municipal cemetery. Other decisions or dicta by the same court to the same effect are to be found in

Springfield v. *Springfield St. Railway Co.*, 182 Mass. 41, 49.

Wheelwright v. *Boston*, 188 Mass. 521, 524.
Higginson v. *Treasurer*, 212 Mass. 583, 585.
Woods v. *Woburn*, 220 Mass. 416, 421.

The same opinion is held by every state court which has had occasion to consider the question; and laws interfering with the proprietary property of political subdivisions of the state have been held unconstitutional in

Webb v. *Mayor*, 64 How. Pr. (N.Y.) 10, 15-17 (waterworks).
Asbury v. *Albemarle*, 162 N.C. 247, 253-254 (waterworks).
Bank v. *Escondido Irrigation Dist.*, 144 Cal. 329, 334 (land).
Ellerman v. *McMains*, 30 La. Ann. 190, 192 (wharf tolls).
Grogan v. *San Francisco*, 18 Cal. 590, 612-613 (land given by the state).
Spaulding v. *Andover*, 54 N.H. 38 (proceeds of bonds given to town).
Milam County v. *Bateman*, 54 Tex. 153, 165-167 (land).
State v. *Springfield*, 6 Ind. 83, 97 (proceeds of land given by the state).
Iowa v. *Barker*, 116 Iowa, 96, 106 (waterworks).*

See also

Benson v. *Mayor*, 10 Barb. 223, 240-246.
People v. *Ingersoll*, 58 N.Y. 1, 30.

*In this case the court goes further in respect to the immunity of municipal property from legislative control in matters of management than some courts (including Massachusetts) would; but the case is in point on the general proposition here under discussion.

Langdon v. *Mayor*, 93 N.Y. 129, 158-159.
Brookhaven v. *Smith*, 188 N.Y. 74, 77.
Western Savings Soc. v. *Philadelphia*, 31 Pa. 185.
Commissioners v. *Sewickly*, 159 Pa. 194.
Coyle v. *McIntire*, 7 Hous. (Del.) 44.
Southington v. *Water Co.*, 80 Conn. 646, 656.
County of Richmond v. *County of Lawrence*, 12 Ill. 1, 8.
Milwaukee v. *Milwaukee*, 12 Wis. 93, 105-109.
City of Henderson v. *Young*, 119 Ky. 224, 227-228.
Horn v. *People*, 26 Mich. 221, 223-224.
South Pasadena v. *Pasadena Co.*, 152 Cal. 579, 592-593.
Tindley v. *Salem*, 137 Mass. 171, 174.
Merrimack Bank v. *Lowell*, 152 Mass. 556, 559.
Davies v. *Boston*, 190 Mass. 194, 197.
Haley v. *Boston*, 191 Mass. 291, 292-293.
Dillon, Municipal Corporations (5th ed.), sec. 109 *seq.*

We are not aware that the United States Supreme Court has yet been called on to decide whether a final judgment or decree shall issue in such a case against the officers charged with the enforcement of the state law objected to. The question has, however, arisen in lower federal courts and has there been decided in accordance with the foregoing principle.

Condemnation of land at Nahant, 128 Fed.

185, 186-187; 136 Fed. 278, 281-283; 153 Fed. 520, 523 (water and sewerage works).

Wichita Water Co. v. *Wichita*, 234 Fed. 415, 421; 264 Fed. 1020 (waterworks).

See also

Safety I. W. & C. v. *Mayor*, 66 Fed. 140, 143 (conduits for telegraph and telephone wires).

Illinois Trust & Bank v. *Arkansas City*, 76 Fed. 271, 282 (waterworks).

Although no actual decision by the United States Supreme Court may be cited, the question has been discussed by this court in numerous opinions which coincide so fully with the decisions of the state and lower federal courts cited above as to leave no doubt as to what the law of this court is. See

Pawlet v. *Clark*, 9 Cranch, 292, 336.

Dartmouth College v. *Woodward*, 4 Wheat. 518, 663-664, 694-695.

E. Hartford v. *Hartford Bridge Co.*, 17 Conn. 79, 94; 10 How. (U.S.) 511, 538.

Commissioners v. *Lucas*, 93 U.S. 108, 115.

Merewether v. *Garrett*, 102 U.S. 472, 518, 530.

Railroad Co. v. *Ellerman*, 105 U.S. 166, 172.

New Orleans v. *N. O. Water W. Co.*, 142 U.S. 79, 91.

Covington v. *Kentucky*, 173 U.S. 231, 240-242.

Worcester v. *Street Ry. Co.*, 196 U.S. 539, 551.

South Carolina v. *United States*, 199 U.S. 437, 461.
Monterey v. *Jacks*, 203 U.S. 360, 362.
Hunter v. *Pittsburgh*, 207 U.S. 161, 178-180.
Vilas v. *Manila*, 220 U.S. 345, 356.
Pawhuska v. *Pawhuska Oil Co.*, 250 U.S. 394, 399.

A municipal corporation may own or hold property for its private or proprietary use, as distinguished from property held for governmental purposes, and as to the title, rents, and profits of all property held in its proprietary capacity it is entitled to the same protection which the state and Federal Constitutions extend to individuals and their property. Such property cannot be taken, or its rents and profits interfered with, by the legislature, or the contracts connected with it impaired, unless just compensation is paid to the municipality.*

This principle also underlies the numerous decisions holding that the municipal owners of such property are liable for negligence in construction or operation, at least in cases where the municipality has control of the work.

All contracts between a municipal corporation and the state relating to property held in a private ca-

*Some authorities, notably Chancellor Kent (see his Notes on the New York Charter, 1836, p. 110), have thought that they could trace back to Magna Charta the doctrine of the immunity of municipal property from unpaid interference by the sovereign power; but the municipal "libertates et liberae consuetudines" which were guaranteed protection by that instrument were chiefly what, at the present day, would be called political privileges. They undoubtedly included such property rights as wharf tolls; but there is little reason to believe that the distinction in American constitutional law between public privileges and proprietary rights was in the minds of the parties to the Great Charter.

pacity are within the constitutional prohibition of legislation impairing the obligation of contracts; and the benefit of these contracts cannot be taken or interfered with except upon the payment of just compensation.

Regarded even as a mere grant or franchise, a legislative permission to a municipality to acquire property of a commercial or proprietary character becomes, when acted on, an irrevocable contract with the state, so far at least as immunity from interference with the fee or beneficial use of the property—as distinguished from methods of management—is concerned.

While the state has greater power over the political existence and administration of municipal corporations than over private companies, and while ordinary municipal charters are not contracts at all in the constitutional sense, all property given by the state and all contracts, franchises, or other incorporeal statutory rights given to or held by such corporations in their proprietary capacity are vested contract or property rights, and are within the protection of the constitution to the same extent and under the same conditions as in the case of private companies.

The state has a wide control over the financial and administrative management of municipal property, whether held in a public or in a proprietary capacity. It can, within certain limits, which may perhaps extend beyond the so-called police power, regulate the use and operation of the private as well as the public property of towns and cities. The state cannot, however, without compensation or consent, transfer the beneficial use or value, capital or annual, of municipal property (including gifts, contracts, and franchises) which is

held in a proprietary capacity from the community which owns it to other communities or corporations, or to the state at large.

The foregoing is believed to be an accurate review of the principles of constitutional law applied by the courts of this country, state and federal, to the contracts and property of municipal corporations.

There has been some difference of opinion in the state courts as to the kind of property that is *per se*, or presumptively, held by a municipal corporation in its proprietary as distinct from its governmental capacity. For instance, as noted *supra*, p. 3, the Supreme Judicial Court of Massachusetts held in *Browne* v. *Turner*, 176 Mass. 9, that under the original subway act of 1894 (which contained no proprietary clauses) the property acquired by the city in reliance on the act was not held in its proprietary capacity and was subject to future legislative action without compensation; but the New York Court of Appeals held that the New York subways, built under legislation which, like the Boston subway act of 1894, contained no proprietary clause, were, nevertheless, held by the city in its proprietary capacity. *Matter of Rapid Transit Commissioners*, 197 N.Y. 81, 96, 105-106; *Matter of City of New York*, 215 N.Y. 109, 122; *Sinsheimer* v. *Underpinning & Foundation Co.*, 165 N.Y. Suppl. 645.

In the case at bar, however, the legislatures of 1902 and 1911 in apt and unmistakable language expressly made the entire subway system the private property of the city in case it should accept the acts.

This legislation amounts to an explicit declaration of the General Court, framed in language too plain for misunderstanding, that, whatever may have been the

legal status of the subways and tunnel built under the acts of 1894 and 1897, for the future this subway and tunnel, and all the structures built under the new acts, and the rents and profits thereof, should be held by the city in its private or proprietary capacity, with the full benefit of the constitutional guarantee that such property and its rents and profits shall not be taken by the state without just compensation. As mere legislative declarations fixing the legal status of property respecting which there had been controversies and litigation, the acts of 1902 and 1911 are conclusive and final.

These acts also constituted, when accepted and acted upon by the city, contracts with the state which could not be impaired without compensation. Both acts were expressly made subject to acceptance by the city, and, when accepted and the authorized structures built at the expense of the city, the expenditures for this purpose must be assumed to have been made upon the faith and credit of the property provisions of the acts. All the elements of a common-law contract—offer, acceptance, and performance—are present; and the subject-matter of the contract was property which the legislature expressly declared was to belong to the city in its private or proprietary capacity, free from interference by the state except upon payment of just compensation.

Whether we consider the legislation of 1902 and 1911 as a declaration of property status, as a grant or franchise, or when accepted and acted upon by the city as a contract with the state, the entire subway system is to be regarded, since the passage and acceptance of these two acts, as the private property of the city of Boston and as within the protection of the constitu-

tional guarantees against subsequent legislative attempts to take the property or its rents and profits, or to impair the obligation of any contracts relating to it, without just compensation.

In the case at bar the state court, having accepted in principle (R. pp. 24-25) the view that the city had private contract and property rights that could not be invaded without compensation, declined to apply it to the plaintiff's case, because it concluded that, construing the act of 1918 as a mere operating contract with or assignment from the Boston Elevated Railway Company, the contract or proprietary rights of the city in the subways and their rentals were not impaired or affected. R. pp. 25-26. The state court also held that the general object of the act was a public one, and that the taxation imposed by it was for a public purpose. R. pp. 23-24.

The plaintiff in error, while not disputing the general right of the state to operate a subway system through state officers and to apportion the cost or loss among the communities in which the railway runs, contends that this principle cannot be invoked to justify any substantial interference with the contract or proprietary rights of any of the communities affected; that the act of 1918, as construed by the court, indirectly but necessarily impairs the contract and proprietary rights of the city of Boston under the prior acts; that, in so far as the act authorizes the levy of taxes to make good the depreciation allowed by the company to take place prior to the passage of the act, such taxes are not for a public purpose; and that the act and the special assessments under it against the plaintiff in error are therefore obnoxious to the con-

tract clause (art. 1, sec. 10) of the Federal Constitution and to the due process of law clause of the 14th amendment.

(*2*) *The act of 1918 as construed by the state court impairs the obligation of the contracts between the city and the state embodied in the acts of 1902 and 1911, impairs the obligation of the contracts or leases entered into by the city and the company under these acts, and deprives the city of its property in the subway rents secured by said acts and leases without just compensation, to the extent that the city is obliged to repay to the state in special taxes the amount expended by the latter for upkeep and rent.*

We assume that the construction placed upon the act of 1918 by the state court, however strained and inconsistent with some of the provisions of that act and with the obvious interest of the legislature to ignore the interests of the city of Boston, is binding on this court.

It is, however, well settled that, where a state law is alleged to constitute a contract or to create vested property rights, this court is not bound by any contrary conclusion that may have been reached by the state court.

Wright v. *Nagle*, 101 U.S. 791, 793-794.
Louisville & N. R.R. Co. v. *Palmes*, 109 U.S. 244, 256.
McCullough v. *Virginia*, 172 U.S. 102, 109.
Stearns v. *Minnesota*, 179 U.S. 223, 232-233.
Great Southern Hotel Co. v. *Jones*, 193 U.S. 532.

Wyandotte Gas Co. v. *Kansas,* 231 U.S. 622, 626.
Interborough Transit Co. v. *Sohmer,* 237 U.S. 277, 284.
Detroit United Ry. v. *Michigan,* 242 U.S. 238, 249.

It is also well settled that the whole question of the effect of a state law, as construed by the state court, upon the rights of the parties affected under the Federal Constitution is open in this court, and that, if these rights can be shown to be substantially impaired by the law thus construed, the decision of the state court that there is no such impairment will be reversed.

Murray v. *Charlestown,* 96 U.S. 432, 444.
Northern Pacific R.R. v. *Duluth,* 208 U.S. 583, 591.
St. Louis &c. R.R. v. *Arkansas,* 235 U.S. 350, 362.
Detroit United Ry. v. *Michigan,* 242 U.S. 238, 249.
Crew Levick Co. v. *Penn.,* 245 U.S. 292.
Standard Oil Co. v. *Graves,* 249 U.S. 389, 394.
American Manuf. Co. v. *St. Louis,* 250 U.S. 459, 462-463.
Wagner v. *City of Covington,* 251 U.S. 95.
Schaffer v. *Carter,* 252 U.S. 37, 55.
Ward v. *Krinsky,* Adv. Op. 1921-22, pp. 616, 618, 622-623.
And cases *supra.*
12 Cor. Jur. p. 1056.

The first proposition is virtually eliminated from the case by the concession or assumption of the state court (R. pp. 24-25) that the property rights of the city of Boston in the subways "are of such a nature as to be within the protection of the constitutional principle declared in Mount Hope Cemetery v. Boston, 158 Mass. 509, and that they cannot be appropriated to other public uses or to use by another public agency without making reasonable compensation to the city"; but, if this statement is not to be taken as an admission of the correctness of the contentions of the plaintiff in error respecting the meaning and effect of the acts of 1902 and 1911, and if this court is to determine the question for itself, it cannot do otherwise than sustain the position of the city.

The reasons for this construction of these acts are set out *supra*, pp. 43-52, and need not be repeated here.

Assuming, then, that the effect of the acts of 1902 and 1911, when accepted by the city and followed by the issue of large amounts of city bonds for the construction of the subways authorized by these acts, was to create or vest in the plaintiff in error full contract and proprietary rights, and assuming that the construction placed upon the act of 1918 is not open to revision in this court, the question is whether the act, thus construed, impairs these contract and proprietary rights.

The state court says that the law of 1918 did not affect the rights of the city under the prior acts because it did not amount to a taking of the property itself, but only to an operating contract with the company, or at most to an assignment of the leases by the company, and that the rights of the city remain the same

as they were before the passage of the act. R. pp. 25-26.

The plaintiff in error contends that the rights of the city under the act of 1918 as construed by the state court are not the same as they were under the acts of 1902 and 1911, and that for this reason, and also because about 70% of any deficit that may be caused by the expenditures of the trustees for upkeep, rent, and dividends is to be repaid by the city in special taxes, the act impairs the obligation of the contract and property rights of the plaintiff in error.

In the first place as to the current upkeep of the leased property: As shown *supra*, p. 4, the whole burden of maintaining the subways "in good order and condition as complete structures adapted to the maintenance and use of lines of railway" is placed by the subway leases upon the Boston Elevated Railway Company, and this obligation not only underlies the rights of the company in the subways, but takes precedence (as a contract or debt) of the right of the stockholders to receive dividends, and stands on a parity with the rights of bondholders or other creditors of the company (unless, perhaps, to the extent that some of them may be secured by mortgage). Under the act of 1918, however, the claims of bondholders and stockholders are to be met anyway and the deficit, if any, thus created is (to the extent of about 70%) to be repaid in special taxes on the city of Boston, which is the other party to the leases and the owner of the subways.

As to the accrued depreciation or deferred maintenance which the company by paying unearned dividends had allowed to accumulate when the act of

1918 took effect, the case is stronger yet. Every dollar represented by this depreciation (in so far as the subways are concerned) must not only, by the terms of the leases, be made up by the company, but on any principle of finance or law should be regarded as a charge on the capital of the company as it stood in 1918. The act of that year, however, provides (*supra*, p. 31) that the trustees shall make this depreciation good, and the deficit thereby created is to be collected (to the extent of about 70%) by special taxes levied on a municipal corporation that is a party to these leases and owns the subways as private property.

As to the rent reserved by the leases, it is true that this is to be paid by the trustees to the company, but the deficit, if any, due to such payments is to be made up by the state, and then 70% of it is collected from the owner of the subway in a special tax.

The state court attempts to meet these objections by saying (R. pp. 24-26) that the city retains all its rights under the leases notwithstanding the act of 1918, which is to be construed as a mere assignment of the leases, against which there is no covenant in those documents. It seems to us too plain for argument that this is not the case unless the special taxes on the lessor and owner of the subways can be justified on some other principle of constitutional law.

This principle the state court finds (R. pp. 26-27) in the well-settled law of this court that a state may apportion the cost of acquiring or operating a public utility upon the communities especially benefited.

None of the decisions relied on by the state court or cited in the brief of the Attorney General (pp. 32-34) relate to cases in which a state law has been invoked

to justify special taxes on a municipal corporation to enable the state to recoup rents and other expenditures upon the private property of the city, which expenditures and rent are by force of existing contracts to be met by a private corporation; and the plaintiff in error contends that the necessary though indirect effect of such taxes is to impair its contract and proprietary rights in the subways and their rentals.

This may most readily be shown, we think, by confining the argument to the question of rent. The question of the expenditures for current upkeep and deferred maintenance are capable of the same treatment; but for the sake of brevity we confine the argument to the rents.

Even if we assume that, so far as the mere payment of rent goes, the tax paid is offset by the rent received, it does not follow that there has been no substantial interference with the city's property rights. The subway debt is still outstanding and the excess of rent over interest (*supra*, p. 4) is obviously a most inadequate provision for amortization. If the contracts and leases of 1902 and 1911 had been allowed to stand, the company would (upon the facts assumed in the bill of complaint) have been forced to default in the subway rents, and to suspend the payment of dividends or interest. This would have given the city the opportunity either to retake possession of the subway system and operate it as a municipal undertaking, or to make a new lease on terms more favorable to the city, but less, and justly less, favorable to the company, than those entered into under the acts of 1902 and 1911. This proprietary right of the plaintiff in error has been taken away by the act of 1918, and

nothing has been substituted but the possibility that the state will itself pay the rent, for which payment the state expressly refuses (in section 18 of the act of 1918, *supra*, p. 33) to make itself liable to the city, and which if paid by the state is to be recouped in great part at the expense of the city.

Let us compare the situation under this act of a subway owning city with that of some other city in the taxing district which, we will assume, pays an equal tax, but has no interest in the subways and owes no subway debt. The assessment on each city is the same, say $500,000, in a given year. This is the net cost of the act for that year to the non-subway owning city, and it is also the net cost to the subway owner city if we ignore the principal of the subway debt; for the latter city's interest on the subway debt practically equals the subway rent, leaving, as in the case of the other city, a net cost for the year of $500,000. But the subway owning city has issued and still owes, we will assume, a debt incurred for the subways equal to their first cost, and the margin or excess of rent over interest is a negligible quantity. It is evident that the position of the subway owner and debtor city is no better than that of the other city. In fact, it is worse. The entire debt is still owed by the subway owning city, no adequate provision is made in the act for its payment or amortization, and some at least of the rights which this city would have in case of default by the lessee are taken away or postponed by the act and by payments under it which are assessed on the city itself.

Another test of the correctness of our argument that the act of 1918 is in effect an impairment of our

contract and property rights under the prior acts is to consider what would have been the result of inserting into the prior acts the provisions of the later act that are here in question. What inducement would there have been to the city of Boston to accept the acts and borrow $31,000,000 on the credit of the proprietary clauses, if these acts had provided that the state could assume the leases, operate the company as it saw fit, and then collect 70% of the resulting deficit from the city itself? Is it not too clear for argument that no such legislation would have been accepted by the city unless the municipal authorities were prepared to abandon the whole theory of a municipally owned subway system? The acts would not have been accepted; and the construction of the subways authorized in 1902 and 1911 would either have been left to the company or undertaken by the state. In the last-named event the cost, original and current, might have been put by special assessment on the communities in the street-railway district including Boston; but the city would not have burdened itself with a $36,000,000 debt.

The plaintiff in error contends that for these reasons the assessment scheme of the act of 1918 is, *per se*, an impairment of the contract and property rights of the city under prior acts, and is therefore obnoxious to the contract and due-process clauses of the Federal Constitution. The argument may be condensed or restated as follows:

Assuming that the compensation provided by the act is adequate, the act is nevertheless unconstitutional because it contemplates the repayment by the city of a part of this compensation by means of a special

tax which is not based on any benefit accruing to the city in its corporate or proprietary capacity.

It is conceded that the state could expropriate the interests of the Elevated Railway Company and the proprietary interests of the city of Boston in the subways, pay compensation for the same, and raise the necessary funds by an addition to the general state tax; although the city of Boston, since its valuation equals one third of that of the entire state, would pay one third of the tax, and thus lose one third of its own compensation.

It may also be conceded that the state may operate a public utility and charge the cost of doing so to the cities and towns existing within the limits of operation provided that a city which owns a part of the system as its private property is not specially taxed out of the annual value of its property or left with a burdensome debt.

It may also be conceded that a part of the cost of operation in such case might be assessed upon a city that owns part of the property, if operation by the state resulted in a direct pecuniary or property benefit to the city as a corporation; as for instance in the case of a metropolitan water system where the state acquires a city's water sources, pays full compensation therefor, and assesses back upon the city its share of the total cost, but then delivers the product of operation by the state, namely, the water, to the city in its corporate or private capacity to be delivered and sold by the city at retail for its own profit.

The case at bar, however, is one in which no special benefit enures to the city in its corporate or proprietary capacity from operation by the state, the rent

paid by the state is collected (if there is a deficit), to the extent of 70%, from the city by means of a special tax, any deficit in upkeep and all expenditures for accrued depreciation are taken care of in the same manner, the legal rights of the city under the original contracts in case of default by the company are postponed or abrogated, the state does not bind itself in any manner to the city to perform the obligations of the leases, and the city is left with an enormous debt, which would never have been incurred if any such results as these could have been foreseen.

The state court (R. p. 27) attempts to meet these arguments by saying that the city of Boston in its proprietary capacity has no more legal ground to complain of taxes assessed upon its inhabitants for the maintenance of a transportation service than has an owner of a parcel of real estate taxed in part to pay the damages caused by the taking from him of another parcel for some public use. This argument seems to us to be entirely beside the case; for, in the case suggested, the individual landowner has property which is peculiarly benefited by the improvement in question. Otherwise the tax is invalid. In this case the city of Boston has no other property that is especially benefited by state operation of the subways.

The act of 1918 seems to us plainly to impair the obligation of the subway acts and contracts in force prior to the passage of the act of 1918, and to deprive the city of a part of its private or proprietary interest in the subways without just compensation.

So far as the authorities go, none will be found which involve the validity of a special assessment upon a city in a taxing district which city owns a large

part of the property for the operation of which it is to be taxed. There are, however, numerous decisions of this court which hold that special assessments that are palpably arbitrary and unreasonable violate the 14th amendment.

Norwood v. *Baker*, 172 U.S. 269.
Houck v. *Little River Drainage District*, 239 U.S. 254, 261.
Myles Salt Co. v. *Commissioners*, 239 U.S. 478, 481.
Gast Realty Co. v. *Schneider Granite Co.*, 240 U.S. 55, 58.
Withnell v. *Ruecking Construction Co.*, 249 U.S. 63, 71.
Hancock v. *City of Muskogee*, 250 U.S. 454, 457-458.
Kansas City & Southern Railway v. *Road Improvement District Act*, 256 U.S. 658, 660.

These cases lay down the rule that, where the relation between the assessment and benefit is palpably arbitrary and unreasonable, the taxes are void. The case at bar would seem to be plainly within this rule.

(3) *The taxation imposed by the act of 1918, so far as the expenditures of the trustees for maintenance deferred or depreciation accrued at the time when public control began are concerned, is not for a public purpose.*

Whether the tax assessed under the provisions of the special act of 1918 is for a public use is, of course, for this court to decide.

The bill of complaint sets forth that prior to the tak-

ing effect of the act of 1918 the Boston Elevated Railway Company had failed to keep its property in proper operating condition, that the property of the company was badly run down and depreciated, and that under the provisions of the act the trustees, in order to make good this deferred depreciation and maintenance, had paid out during the first year of public control as a current expense and assessed against the district approximately $2,000,000, or twenty times the average annual allowance made by the company for depreciation during the preceding ten years. R. pp. 4, 7, 22. The state court held that section 13 of the act of 1918 authorized deferred maintenance as a current expense in order to rehabilitate the property and return it in good operating condition (R. pp. 22-23); and that taxation for the purpose of meeting a deficit in the public operation of the property caused by making good depreciation allowed by the company, a private corporation, was for a public use. R. p. 24.

Now it is well settled that past or accrued depreciation is to be deducted in estimating the value of property on which a public service company is entitled to a fair return; and past or accrued depreciation cannot be allowed as current expense in determining rates.

Knoxville v. *Knoxville Water Co.*, 212 U.S. 1, 9-10, 13-14.

Kansas City So. Ry. v. *United States*, 231 U.S. 423, 448.

Galveston Electric Co. v. *City of Galveston*, 272 Fed. 147; aff'd U.S. Adv. Op. 1921-22, p. 386.

Goldfield Consol. Water Co. v. *Public Service Commission*, 236 Fed. 979, 981, 984.

In

Knoxville v. *Knoxville Water Co.,*

Mr. Justice Moody says, p. 14:

"If, however, a company fails to perform this plain duty [to take care of depreciation] and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

In

Galveston Electric Co. v. *City of Galveston,*

Hutcheson, D.J., says, p. 170:

"Upon no view of it should the public be required to pay such rates as would permit the company, at the public's expense, to re-establish its property in the condition it ought to have been maintained in. The language of the Supreme Court in the Knoxville Water Co. case has application here:

" 'If, however, a company fails to perform this plain duty, and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities or of omission to exact proper prices for the output, the fault is its own.' "

A part of the taxation contemplated by the act of 1918 is to make up a deficit brought about in great part by charging to current expense accrued depreciation. Its effect is to compel the city of Boston (as well as the other communities in the district) to make good capital which had been impaired by the prior misfortunes or mismanagement of the Boston Elevated Railway Company. It is clear, as shown above, that the company was not and is not entitled to fares which would take care of this deferred depreciation as a current expense. See cases, *supra*, pp. 63-64. Yet this is the very thing the act accomplishes. Dividends on common and preferred stocks are guaranteed, and the property is to be rehabilitated and returned to the company in good operating condition, that is, with all depreciation, whether arising during or before the period of public control, taken care of in the first instance by the state, but ultimately by taxes levied on particular communities.

Not only is the tax in question for the benefit of a private corporation, but it is imposed for the sole benefit of the company. All the alleged benefits to the public of public operation could be secured by taking over the property of the company, operating it through public trustees, and then paying to the company whatever the net earnings might be. If the power of eminent domain should have to be invoked, the most that the public would have to pay would be the fair net annual value of the property as it stood at the time of taking. In neither case would there be any specific guarantee of a payment to the company sufficient to enable it to keep down its interest and to pay fixed dividends on its stock. The act of 1918, however, by pro-

viding that the state in the first instance, and ultimately the towns and cities in the district, shall be taxed to pay fixed dividends and interest to the company besides making good or taking care of all depreciation accrued at the beginning of public control, amounts to an outright gift to the company of the money required to make this depreciation good, and is for the sole benefit of its creditors and stockholders.

The inclusion of deferred maintenance as an operating expense is a rehabilitation of the company's property at public expense for the benefit of a private corporation; and a tax in furtherance of such a purpose is not for a public use. Any attempted assessment thereof on particular communities violates the due-process provision of the 14th amendment.

Loan Association v. *Topeka*, 20 Wall. 655, 663-664.

Cole v. *La Grange*, 113 U.S. 1.

See *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 158.

Brannon, The Fourteenth Amendment, 1901, p. 160.

This court has held that state statutes authorizing municipalities to extend their help to railroads are constitutional,

Olcott v. *The Supervisors*, 16 Wall. 678;

Town of Queensbury v. *Culver*, 86 U.S. 83;

New Buffalo v. *Iron Co.*, 105 U.S. 73;

See *1 Dillon, Municipal Corporations* (5th ed.), sec. 313, p. 569;

but the statutes in these cases were enabling acts which authorized the municipalities to proceed to lend their

money or credit if the acts were accepted by the voters of the municipality to be taxed.

In the present case the statute is a mandatory, not an enabling act. The tax is assessed on the city of Boston without its assent at the mandate of the legislature for the benefit of a private corporation.

Under similar facts a state statute was held unconstitutional in

People v. *Batchellor*, 53 N.Y. 128;
See *1 Dillon, Municipal Corporations* (5th ed.), pp. 217-128;

and we have no decision of this court supporting a mandatory tax clearly enuring to the sole benefit of a private corporation.

The legislation embodied in ch. 159 of the special acts of 1918 is therefore unconstitutional as an attempted use of the taxing power for the benefit of a private corporation, and as violating the principle set forth in *Galveston Electric Co.* v. *City of Galveston* and the cases cited *supra*, p. 63.

It may, indeed, well be questioned whether the entire scheme for the compulsory taxation of particular communities in order to pay fixed dividends and interest to a private company is not obnoxious to the 14th amendment; but there can be no doubt, we think, that the act of 1918 is unconstitutional in so far as it attempts to levy a special tax on the city of Boston to make good the depreciation which the company had allowed to accumulate by July 1, 1918.

(4) *Conclusion.*

Inasmuch as the motion to affirm goes to the merits of the case, the foregoing considerations are neces-

sarily an argument in support of the contention of the plaintiff in error that the decree of the state court should be reversed.

As to the propriety of the motion, we need only refer to the language of rule 6, sub-division 5, of the rules of this court, authorizing affirmation only when the questions on which the decision of the cause depends are "so frivolous as not to need further argument."

This case leaves no room for any such conclusion. We think that it presents what is virtually a new question of federal law; certainly one that cannot with any pretense to accuracy be claimed to have been "plainly foreclosed" by prior decisions of this court.

The motion to affirm should be denied.

Respectfully submitted for the city of Boston, plaintiff in error.

By E. Mark Sullivan,
Corporation Counsel.
Joseph P. Lyons,
Asst. Corp. Counsel.

Nathan Matthews,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 141.

THE CITY OF BOSTON,
Plaintiff in Error,
v.
JAMES JACKSON, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; JAMES F. JACKSON, SAMUEL L. POWERS, ET AL., TRUSTEES, &C., ET AL.

BRIEF ON BEHALF OF JAMES F. JACKSON, SAMUEL L. POWERS, STANLEY R. MILLER, JOHN F. STEVENS, AND WINTHROP COFFIN, TRUSTEES OF THE BOSTON ELEVATED RAILWAY COMPANY.

Statement of Case.

This is a writ of error to the Supreme Judicial Court of Massachusetts to review a judgment of that court holding constitutional chapter 159 of the Special Acts of the General Court of Massachusetts of 1918, entitled "An Act to provide for the public operation of the Boston Elevated Railway Company," and sustaining certain action which had been taken by the public trustees under this statute.

The case was instituted in the Supreme Judicial Court of Massachusetts by a bill in equity brought by the City of Boston against the Treasurer and Receiver General of the Commonwealth of Massachusetts, the Board of Trustees of the Boston Elevated Railway Company appointed under the provisions of said Spec. St. 1918, c. 159, and the Boston Elevated Railway Company to prevent the assessment upon the city of any part of the deficiency between the revenues and expenses of the company while being operated under said act, on the ground that this statute and the action of the trustees thereunder in determining the amount of such deficit was violative of the constitutional rights of the city. The case was heard on demurrers filed by all the defendants to the substitute bill of complaint (Rec. pp. 9, 10, 11). The presiding judge overruled the demurrers and reported the case for the determination of the full court of the Supreme Judicial Court (Rec. p. 3). The full court reversed the decree overruling the demurrers and ordered a decree to be entered sustaining the demurrers for want of equity (Rec. p. 17). Thereafter the plaintiff amended its bill by substituting James Jackson, the present Treasurer and Receiver General of the Commonwealth, for Charles L. Burrill, as one of the parties defendant, and a demurrer was filed in behalf of said James Jackson upon the same grounds as the demurrers of Charles L. Burrill (Rec. pp. 14, 15). By stipulation (Rec. p. 16) the original demurrers of the other defendants apply to the bill as finally amended. A final decree was entered sustaining the demurrers for want of equity and dismissing the bill of complaint (Rec. p. 17).

The case stated by the substitute bill of complaint sets forth certain provisions of Spec. St. 1918, c. 159, and imports by reference the other material portions of this statute. Briefly stated, this act provides for the appointment by the Governor of a board of trustees to manage and operate the Boston Elevated Railway Company "and the properties owned, leased, or operated by it" for a period of ten years and thereafter until such time as the Commonwealth elects to discontinue such public management and operation, and that such board shall "take and have possession of said properties in behalf of the Commonwealth during the period of public operation" (sec. 2).

It is made the duty of the trustees to "fix such rates of fare as will reasonably insure sufficient income to meet the cost of service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable for depreciation of property and for obsolescence and losses" and fixed dividends on the preferred and common stock of the company (sec. 6). They are also required "to make such provision for depreciation, obsolescence and rehabilitation, that upon the expiration of the period of public management and operation the property shall be in good operating condition" (sec. 13).

The railway company is required to raise $3,000,000 by the issuance of preferred stock to be used for the improvement of the property of the company and the establishment of a reserve fund of $1,000,000 (sec. 5). Whenever the income of the company is insufficient to meet the cost of service as defined in the act, the reserve fund is to be used to make up the deficiency,

and if, as of the last day of June in any year, the amount remaining in the reserve fund is insufficient to meet such deficiency, the trustees are required to notify the Treasurer and Receiver General, and the Commonwealth is thereupon to pay over to the company the amount of such deficiency less the amount, if any, in the reserve fund applicable thereto. On the other hand, when the income of the company is more than sufficient to meet the cost of service, such excess becomes a part of the reserve fund, and if, as of the last day of June, the reserve fund exceeds the amount originally established, the trustees are required to apply such excess, so far as necessary, to reimbursing the Commonwealth (secs. 9, 11).

Payments made by the Commonwealth to the company to meet the deficiency between the income and cost of service are to be assessed upon the cities and towns in which the company operates by an addition to the next state tax in proportion to the number of persons in said cities and towns using the service of the company, and when the Commonwealth is reimbursed by the company for such payment, the amount so received is to be distributed among such cities and towns in the same proportion in which they were assessed (secs. 14, 11).

The trustees are directed to consider, from time to time, changes in the rates of fare. If the amount of the reserve fund is less than 70 per cent of the amount originally established, and during the preceding year the income has been less than the cost of service, they are required to put into effect a higher rate of fare. If, on the other hand, the amount of the reserve fund exceeds by 30 per cent or more the amount originally

established, and during the preceding year the income has exceeded the cost of service, the trustees are required to put into effect a lower grade of fare. In determining the amount of the reserve fund for this purpose there is first deducted all payments made by the Commonwealth for which it has not been reimbursed (that is, the fare is not lowered until the Commonwealth has been repaid in full) (sec. 10).

If the period of public management and operation expires and the reserve fund is then less than the amount originally established because of deficiency in income, the Commonwealth is to pay to the company a sum sufficient to restore the fund to its original amount, and if the amount remaining in the reserve fund is more than that originally established, such excess is to be paid over to the Commonwealth and distributed among the cities and towns in which the company operates in the same proportion in which they would be liable to assessment for deficiencies from its operation (sec. 13).

The substitute bill of complaint states that the plaintiff is one of the cities and towns in which the company operates and will be called upon to pay a large percentage of any amount which the Commonwealth pays to the company (Rec. p. 5). The trustees of the company have notified the Treasurer and Receiver General of the Commonwealth of a deficiency between the cost of service and the revenue of the company amounting to nearly four million dollars, and the cost of service from which this deficiency was determined included for the year ending June 30, 1919, the sum of approximately two million dollars as a charge for depreciation and the sum of approximately two

million three hundred thousand dollars for maintenance and repairs (Rec. p. 4).

The plaintiff claims that the above amounts which the trustees have charged for depreciation, repairs, and maintenance are excessive, and that therefore the deficiency of which the trustees have notified the Treasurer and Receiver General is correspondingly excessive (Rec. p. 4).

The bill sets forth that by virtue of the provisions of Sts. 1902, c. 534, and 1911, c. 741, the plaintiff owns in its private or proprietary capacity certain subways and tunnels and the right to receive rents and profits therefrom, and that leases or contracts for the use of said subways and tunnels have been entered into between the plaintiff and the company. It is claimed that Spec. St. 1918, c. 159, violates the plaintiff's rights under the Constitution of the United States in that it impairs the obligations of contracts previously entered into between the plaintiff and the Commonwealth and embodied in Sts. 1902, c. 534, and 1911, c. 741, and the obligations of the contracts or leases previously entered into between the plaintiff and the company (Rec. pp. 5, 6).

It is also claimed in the bill that the delegation of authority to the board of trustees to determine the allowance to be made for depreciation, obsolescence, and losses in the manner provided by said act was beyond the authority of the legislature and deprived the plaintiff of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (Rec. p. 7).

The bill further states that, at the time when Spec.

St. 1918, c. 159, was enacted, the Boston Elevated Railway Company was in straitened circumstances; that its financial condition and credit was such that the company was unable satisfactorily to operate its property and give service to the public; and that said chapter 159 amounted to giving a gratuity to the company, in violation of the constitutional rights of the city (Rec. p. 8).

The relief prayed for in the bill is that Spec. St. 1918, c. 159, be declared unconstitutional; that the Treasurer and Receiver General be enjoined from paying the deficiency of which he has been notified and assessing any part thereof upon the plaintiff; that the board of trustees be enjoined from determining the amount of any deficiency between the income and cost of service and notifying the Treasurer and Receiver General thereof; and for general relief.

The court in its opinion held that it was a public purpose and within the constitutional power of the legislature to provide for the public management and control of the company and its property in the manner provided by Spec. St. 1918, c. 159; that the act was in substance a lease by the railway company of its property to the Commonwealth; that the provisions in the act for depreciation, obsolescence, losses, and rehabilitation were in the nature of compensation or rental to be paid for the use of the property; that the specific amounts to be allowed for these items need not be determined by the legislature, but may be left to men of experience to decide as a practical question; that no facts were alleged which showed the trustees had transcended their powers or failed to conform to the provisions of the act; that the statute

did not authorize the taking of the subways and tunnels, but only of the company's leasehold interest therein; that the trustees acquired no greater rights in them than the company itself owned; that the assessment of part of the deficit upon the plaintiff was not a taking of the rentals of the subways and tunnels or other rights of the city; that the city was not assessed in its proprietary capacity, but was merely used as a taxing agency; and that the manner in which the tax was to be levied was valid.

Condensed Statement of Assignment of Errors.

The errors assigned are that the court erred in refusing to hold that the plaintiff was deprived of its property without due process of law; denied the equal protection of the laws; and that the obligations of the contracts embodied in St. 1902, c. 534, and St. 1911, c. 741, were impaired, contrary to section 10 of article 1 of the Constitution of the United States, and of the Fourteenth Amendment, for the following reasons:

1. The provisions of Spec. St. 1918, c. 159, amounted to taxation of the plaintiff for a private purpose.

2. The delegation contained in this statute of authority to the trustees to determine what allowance should be made for depreciation, rehabilitation, and for obsolescence and losses was unconstitutional.

3. The sums charged by the trustees for depreciation were unreasonable.

4. The assessment through taxation upon the plaintiff of the deficit between the income of the company and the cost of service, which included rental paid by the company to the city for the subways and tunnels and the cost of repairs, which under the leases with

the city were to be borne by the company, impaired the obligation of such leases and of contracts embodied in St. 1902, c. 534, and St. 1911, c. 741.

5. That Spec. St. 1918, c. 159, should be construed as effecting a taking of the subways and tunnels or the plaintiff's interest therein.

6. That the provisions of Spec. St. 1918, c. 159, authorizing the assessment upon the plaintiff were arbitrary and unreasonable.

Statutes.

SPECIAL ACTS, 1918, c. 159.

AN ACT TO PROVIDE FOR THE PUBLIC OPERATION OF THE BOSTON ELEVATED RAILWAY COMPANY.

Be it enacted, etc., as follows:

SECTION 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided and until their successors are duly appointed and qualified, and each shall receive from the company as compensation for his services five thousand dollars annually. . . .

Said trustees shall assume the management and operation of the company's property on the first day of the month next following their appointment and qualification.

SECTION 2. Said board of trustees, hereinafter called the trustees, shall manage and operate the Boston Elevated Railway Company hereinafter called the company, and the properties owned, leased or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and, subject to the provisions of this act, shall take and have possession of said properties in behalf of the commonwealth during the period of public operation, and, for the purposes of this act, shall, except as is otherwise provided in this act have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds. They shall have the right to appoint and remove in their discretion the president, treasurer and clerk of the corporation, and all officers of the company other than the board of directors. They shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.

In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their agents, servants and employees shall be deemed to be acting as agents of the company and not of the commonwealth, and the company shall be liable for their acts and negligence in such management and operation

to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable. A majority of the board shall constitute a quorum for the transaction of business, and the action of a majority of those present at any meeting shall be deemed the action of the trustees.

Nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property.

SECTION 3. The trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds and other evidences of indebtedness of, the company. No contracts for the operation or lease of any subways, elevated or surface lines in addition to those now owned, leased or operated by the company, or any extensions thereof beyond their present limits, shall be entered into which shall involve the payment of any rental or other compensation by the company beyond the period of public operation without the consent of the directors of the company, but surface lines may be constructed or purchased beyond the limits of existing surface lines after consent of the directors has been refused, if the trustees shall determine, after a public hearing, that public necessity and convenience require such construction or purchase: *provided, however,* that if the commonwealth shall elect under the provisions of section twelve to discontinue the public management and operation of the company's property, no such surface lines shall thereafter be constructed or purchased without such consent.

All the authority heretofore granted to the company to accept the provisions of section five of Part I of chapter seven hundred and forty-one of the acts of nineteen hundred and eleven, as amended by chapter two hundred and ninety-seven of the Special Acts of nineteen hundred and fifteen, is hereby conferred upon the trustees during the term of public operation, and the trustees shall have all powers which the company now has to enter into a contract under the provisions of chapter three hundred and forty-two of the Special Acts of nineteen hundred and sixteen; and upon the acceptance of such contract, any and all powers and obligations granted to and imposed upon any and all boards and municipalities by said act, had the company accepted the contract, shall thereby be extended, revived and restored, so that such contract shall have the same force and effect as if the company had accepted it. The trustees shall cause to be paid all amounts which may from time to time become due from the company, and shall declare dividends at the appointed times upon the preferred and common stock of the company, and provide for the payment of the same.

SECTION 4. The stockholders of the company shall, as heretofore, elect a board of directors which shall, however, during the period of public operation, have no control over the management and operation of the street railway system, but its duties shall be confined to maintaining the corporate organization, protecting the interests of the corporation so far as necessary, and taking such action from time to time as may be deemed expedient in cases, if any, where the trustees cannot act in its place. The by-laws of the company shall be modified, as far as may be necessary, to conform to the provisions of this act.

By its acceptance of this act, the company and the stockholders and directors thereof shall be deemed to have assented to and authorized all issues of stock, bonds and other evidences of indebtedness which the trustees may find necessary or advisable during the period of public operation, or which may be required during the period of public operation to carry out any existing or future obligations of the company; but, notwithstanding such assent and authorization, the stockholders and directors shall from time to time take such action with respect thereto as may be requested by the trustees.

Such sum as may be deemed reasonable shall be allowed to the board of directors each year by the trustees to provide for the maintenance of the corporate organization of the company and the performance of such duties as may be necessary by the company and the directors.

Section 5. The Boston Elevated Railway Company shall, prior to or at the time of its acceptance of this act, provide for raising three million dollars in cash by the issue of preferred stock at not less than the par value which shall be one hundred dollars per share. . . .

One million dollars shall be set aside as a reserve fund to be used only for the purposes hereinafter specified, and the remaining two million dollars shall be subject to the disposition of the trustees to pay for the cost of additions and improvements to the company's property. . . .

Section 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet

the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. Dividends upon the common shares shall be payable quarterly, but no dividends shall be paid upon such common shares in excess of the rates herein specified. The first payment shall be made at the expiration of six months from the commencement of public operation, and the total of the first three quarterly dividend payments shall be five per cent on the par value of the common stock.

Section 7. The trustees shall, within sixty days after their appointment and qualification, fix and put in operation rates of fare which in their judgment will produce sufficient income to meet the cost of the service as defined in section six, and within sixty days thereafter shall adopt and publish a schedule of eight different grades of fare, of which four shall be below and four above the rate of fare first established; and

whenever by reason of any change in the existing rate of fare there are less than four grades, either above or below the rate then in force, the trustees shall forthwith adopt and publish a schedule of additional grades of fare so that there shall always be not less than four grades of fare above and below the existing rate of fare.

If at any time the trustees shall be of opinion that said rates of fare or schedule should be changed, either with regard to the method or basis upon which the fares and transfer privileges are established, or because the steps between the different grades are too small or too great, or for any other reason, the trustees may adopt, publish, and put in effect new schedules or rates of fare to take the place of the existing schedule or rates of fare.

SECTION 8. The reserve fund shall be used only for the purpose of making good any deficiency in income as provided in section nine or for reimbursing the commonwealth as provided in sections eleven and thirteen, and until such use, may be invested in income-producing securities in the discretion of the trustees, and all income or interest received thereon shall be treated as part of the general income of the company.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, and whenever, on the other hand, such income is more than sufficient to meet the cost of the service, the excess shall be transferred to and become a part of the reserve fund.

SECTION 10. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day

of any September, December, March or June thereafter, the amount of the reserve fund shall exceed by thirty per cent or more the amount originally established, and during the preceding three months the income shall have exceeded the cost of the service, the trustees shall within one month thereafter put into effect the next lower grade of fare that has been adopted as provided in section seven; and if, as of any such last day of June, September, December or March, the amount of the reserve fund shall be less than seventy per cent of the amount originally established, and during the preceding three months the income has been less than the cost of the service, the trustees shall within one month thereafter put into effect the next higher grade of fare, and the fare shall continue to be decreased or increased, as the case may be, subject to the same conditions, if the amount of the reserve fund is above or below said limits, as of such quarterly dates. In determining the amount of the reserve fund for the purposes of this section only there shall first be deducted therefrom any amounts which have been paid by the commonwealth to the company under the provisions of section eleven, and for which the commonwealth has not been reimbursed.

Section 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve

fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. If, as of the last day of any June or December thereafter during the period of public operation, the reserve fund shall exceed the amount originally established, the trustees shall apply the excess, so far as necessary, to reimbursing the commonwealth for any amounts which it may have paid to the company under the provisions hereof, and the commonwealth shall thereupon distribute the amount so received among the cities and towns in which the company operates, in proportion to the amounts which they have respectively been assessed as provided in section fourteen.

In order to meet any payment required of the commonwealth under the provisions of this section the treasurer and receiver general may borrow at any time, in anticipation of the assessments to be levied upon the cities and towns, such sums of money as may be necessary to make said payments, and he shall repay any sums so borrowed as soon after said assessments are paid as is expedient.

Section 12. Notwithstanding anything contained in this act, the public management and operation of the railway system of the company shall continue after the expiration of said ten year period upon the terms and conditions herein specified until such time as the commonwealth shall elect to discontinue such public management and operation. The common-

wealth shall have the right to terminate such public management and operation, either at the expiration of the said ten year period or at any time thereafter, by appropriate legislation passed not less than two years before the date fixed for such termination.

SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition. If the period of public management and operation expires, control of the property shall then revert to the company, and if at that time the reserve fund shall be less than the amount originally established because the income during the period of public management and operation has been insufficient to pay the cost of the service, the commonwealth shall forthwith pay over to the company an amount sufficient to restore it to its original amount; and if the amount in said reserve fund is then in excess of the amount originally established and any amount required to meet the cost of the service to the expiration of such period, such excess shall be paid into the treasury of the commonwealth and distributed among the cities and towns in which the company operates in the same proportions as the assessments provided for by section fourteen.

SECTION 14. In case the commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be as-

sessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of said payment, said proportion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose.

SECTION 15. Upon the termination of the period of public management and operation, the company shall manage and operate the property and may fix and collect such just and reasonable fares as will produce an income sufficient to pay the reasonable cost of the service as defined in section six, including dividends upon the common stock from time to time outstanding of six per cent per annum on the par value thereof but no more, and may establish schedules of fares which shall automatically increase or decrease in the same manner as is authorized in the case of the trustees: *provided*, that the commonwealth shall be under no liability to make any payments to the company by reason of any deficiencies in income accruing after the discontinuance of public operation. The company shall thereafter be subject to public regulation and supervision in such manner as may be determined by the general court, but such regulation and supervision shall not be exercised so as to reduce the income below the reasonable cost of the service as defined in this act.

SECTION 16. The acceptance of this act by the Boston Elevated Railway Company shall constitute an agreement upon its part to sell to the commonwealth or any political subdivision thereof at any time dur-

ing the period of public management and operation its whole assets, property and franchises as a going concern upon the assumption by the commonwealth of all its outstanding indebtedness and liabilities and the payment of an anount in cash equal to the amount paid in in cash by its stockholders for stock then outstanding. . . .

The provisions of this section shall not preclude the commonwealth or any political subdivision thereof from acquiring the property and franchises of either the Boston Elevated Railway Company or the West End Street Railway Company at any time through the exercise of the power of eminent domain.

SECTION 17. Section ten of chapter five hundred of the acts of eighteen hundred and ninety-seven, as amended by chapter three hundred and eighty-eight of the acts of nineteen hundred and eight and by Part IV of chapter three hundred and seventy-three of the Special Acts of nineteen hundred and seventeen, and all other acts and parts of acts which are inconsistent herewith, so far as they apply to the Boston Elevated Railway Company, are hereby repealed.

SECTION 18. With the exception of section five, which shall take effect upon the passage of this act, this act shall take effect upon its acceptance by the holders of not less than a majorty of all the stock of the Boston Elevated Railway Company and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing of certificates of acceptances with the secretary of the commonwealth, and the filing with the said secretary of a certificate, signed and sworn to by a majority of the directors of the

Boston Elevated Railway Company, that the entire three million dollars of preferred stock provided for by section five has been subscribed for, and at least thirty per cent of his subscription has been paid in in cash by each subscriber, and that no dividends have been declared or paid upon the company's common stock since the passage of this act

None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, which provisions shall constitute a contract binding upon the commonwealth. But if during said period of management and operation the trustees shall be deprived of the possession or control of said property by reason of any action to enforce any debt, claim or obligation which existed at the time the trustees took possession, the commonwealth shall be under no obligation to pay any sum or sums under this act to meet any deficiency in income accruing while the trustees are deprived of such possession and control.

St. 1897, c. 500, sec. 10, as Amended by St. 1908, c. 388, and St. 1917, c. 373, part IV.

An Act to promote rapid transit in the city of boston and vicinity.

Section 10. Said corporation may establish and take a toll or fare, which shall not exceed the sum of five cents for a single continuous passage in the same

general direction upon the roads owned, leased or operated by it; and this sum shall not be reduced by the legislature during the period of twenty-five years, from and after the passage of this act: *provided, however,* that the public service commission may upon the petition of the board of aldermen of a city, selectmen of a town, or fifty legal voters of a city or town, in which any of the lines owned, leased or operated by said corporation are located, after due notice and hearing the parties interested, reduce such toll or fare; but such toll or fare shall not, without the consent of said corporation, be so reduced as to yield, with all other earnings and income of said corporation, except the income of the funds deposited with the treasurer of the commonwealth as required by this act and said chapter five hundred and forty-eight, a net divisible income, after paying all expenses of operation, interest, taxes, rentals, and other lawful charges, and after charging off a reasonable amount for depreciation, of less than eight per cent per annum on the outstanding capital stock of said corporation actually paid in in cash. The report of the commission shall be final and conclusive for one year. During said period of twenty-five years no taxes or excises not at present in fact imposed upon street railways shall be imposed in respect of the lines owned, leased or operated by said corporation, other than such as may have been in fact imposed upon the lines hereafter leased or operated by it at the date of such operating contract or of such lease or agreement hereafter made therefor, nor any other burden, duty or obligation which is not at the same time imposed by general law on all street railway companies: *provided, however,* that said cor-

poration shall be annually assessed and shall pay taxes now or hereafter imposed by general law in the same manner as though it were a street railway company, and shall, in addition, as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it, pay to the commonwealth, on or before the tenth day of November in each year, during said period of twenty-five years, an annual sum, the amount of which shall, in each year ending the last day of September, be equal to the excess, if any, of the dividends over six per cent paid by the company during that year. The above sum shall be paid into the treasury of the commonwealth and distributed among the different cities and towns in proportion to the mileage of elevated and surface main track, reckoned as single track, which is owned, leased or operated by said corporation and located therein. Said corporation shall also provide free transfer from elevated to surface and from surface to elevated cars at all stations of the elevated lines reached by surface lines and from one elevated car or train to another at junction points entitling a passenger to a continuous ride in the same general direction, and such further free transfers on all the surface lines of railway owned, leased or operated by it, as may be satisfactory to or required by the public service commission.

Argument.

1. Spec. St. 1918, c. 159, in Effect Constitutes a Lease by the Commonwealth.

The Commonwealth, by the legislative agreement embodied in this act, acquired the possession and use of the Boston Elevated Railway Company and all the properties owned, leased, or operated by it for a term of ten years and thereafter until terminated in the manner provided by the act.

As compensation therefor, the company was assured of the payment of all operating expenses, including proper allowances for depreciation, obsolescence, and losses of property, and was to receive a rental equal to the amount of its fixed charges, plus whatever amount might be required for rehabilitation as provided in section 13, and dividends upon its stock at the rates specified in the act. The stock was taken as a convenient measure of the rental, which is the ordinary and usual method where a transportation company is leased. Indeed, such a method is particularly apt where, as in Massachusetts, stock in street railway companies can be issued only under the supervision of public officials and subject to laws designed to prohibit stock watering. Gen. Laws, c. 161, sec. 28. This was the situation with regard to the issue of stock of the Boston Elevated Railway Company. St. 1894, c. 548, sec. 5; St. 1 4, c. 462.

In an opinic to the Senate, 231 Mass. 607, the justices of the Supreme Judicial Court state the meaning and effect of this statute in the following language;

> "That act was in substance and effect a taking over of the Boston Elevated Railway by the Com-

monwealth for operation for a limited period of ten years and possibly for a longer period under some circumstances, upon condition that its terms should be accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company and of the West End Street Railway Company and upon the further condition that the Boston Elevated Railway Company should provide for raising $3,000,000 by the issuance of that amount of new and preferred stock. Two main purposes of that act were (1) to provide for the establishment of rates of fares which should be adequate to pay the cost of performing the service furnished by the Commonwealth through using the property of the Boston Elevated Railway Company as that cost was defined in sec. 6, and (2) to make an agreement for the payment of the rental for the use of the Boston Elevated Railway Company and its property by the Commonwealth by agreement with the companies interested to be manifested by acceptance by their stockholders. That rental was fixed by sections 5 and 6 at payment not exceeding seven per cent on the preferred stock and by payment of dividends on the common stock of five per cent for the first two years, five and one half per cent for the succeeding two years, and six per cent for the remainder of the period of public operation. The chief design of that act was to provide by public operation for fares at rates sufficient to meet all costs of furnishing the service.

"In sec. 11 provision was made for the advancement of moneys by the Commonwealth (to be

assessed upon the cities and towns enjoying the service) to maintain the reserve fund. But that was rather an incidental provision to tide over the affairs of the company until the fundamental idea of rates adequate to meet the cost of the service could be established and the habits of the travelling public could become adjusted thereto. That act was accepted by the stockholders of the two corporations and the new stock has been subscribed. Thus the act has become operative according to its terms and constitutes a contract between the parties as set forth in sec. 18" (pp. 607, 608).

"In essence Spec. Acts 1918, c. 159, was a legislative agreement for the lease to the Commonwealth of a public utility to be operated for a limited time by public officers upon the payment of fair rental on an investment made under public supervision and under laws prohibiting stock watering or other means of inflation" (p. 609).

The court below in its opinion in the instant case used substantially the same language with reference to this act, as follows:

"In essence this act, having been accepted by the railway companies, constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amounts specified in way of compensation for the use thereof. The public operation is undertaken by the Commonwealth, not as a source of profit, but solely for

> the general welfare. The main design of the act is public operation of the railway company at such rates of fare to be fixed by the trustees from time to time as shall afford revenue sufficient to defray all charges and the dividends established by the act" (Rec. p. 21). . . . "The effect of the act when accepted, as it has been, was in its essential features a lease of the railway property to the Commonwealth or at least a contract for public operation upon stipulated terms" (Rec. p. 23).

As pointed out by the court below, if the Commonwealth had seized by the exercise of eminent domain the precise rights acquired by the agreement embodied in Spec. St. 1918, c. 159, it would have been obliged to pay a reasonable compensation therefor, and there is no constitutional reason why such reasonable compensation cannot be fixed by agreement as has been done in this case with the legislature representing the Commonwealth.

> *Boston & Lowell R.R.* v. *Salem & Lowell R.R.*, 2 Gray, 1, 32.

It is well settled that the wisdom of legislation and the amount of compensation to be paid under such a legislative agreement are matters for the legislature alone to determine, and will not be reviewed by this court.

> *Fletcher* v. *Peck*, 6 Cranch, 87.
> *United States* v. *Des Moines, &c. Co.*, 142 U.S. 510, 542.
> *New Orleans* v. *Warner*, 175 U.S. 120, 140.

Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161.
Green v. *Frazier*, 253 U.S. 233.

2. The Assessment Complained of was for a Public Purpose.

It has been uniformly recognized by this court that the question of what is a public purpose or public use depends largely upon local conditions, including the long-established methods and habits of the people, concerning which the local authorities, legislative and judicial, have peculiar facilities for securing accurate information, and that therefore the judgment of the highest court of the state upon this question is entitled to the greatest respect.

Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112, 160.
Clark v. *Nash*, 198 U.S. 361, 369.
Strickley v. *Gold Mining Co.*, 200 U.S. 527.
Offield v. *N.Y. &c. R.R. Co.*, 203 U.S. 372, 377.
Hairston v. *Danville &c. R.R. Co.*, 208 U.S. 598.
O'Neill v. *Leamer*, 239 U.S. 244, 253.
Jones v. *Portland*, 245 U.S. 217, 221, 222.
Green v. *Frazier*, 253 U.S. 233.

In *Union Lime Co.* v. *Chicago &c. R.R. Co.*, 233 U.S. 211, 218, the court said:

> "The State through its highest court declares the use to be a public one and we should accept its judgment unless it is clearly without ground."

The court below took cognizance of the fact, as a matter of common knowledge, that the passenger transportation service for Boston and its suburbs is chiefly by the means afforded by the Boston Elevated Railway system through lines of electric railways on the surface, upon elevated structures, and through subways and tunnels (Rec. p. 21), and held that the nature of that transportation system related to the accommodation of the public and concerned the public welfare. In the present state of civilization and economic conditions the operation of means of transportation is of vital concern to all the people. Contemplation of the results of the discontinuance of the operation of street railway transportation in any of our large cities graphically answers any suggestion that the welfare of the general public is not involved.

The citation of authority given in the opinion of the court in support of its decision, and which need not be here repeated, makes it clear beyond peradventure of doubt that such a purpose has always been recognized in this Commonwealth as distinctly public.

But even if the long and well-established line of precedents and decisions in Massachusetts should not be regarded as controlling, the decisions of this court have been uniformly to the same effect.

In *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 382, this court held that a corporation engaged, under legislative authority, in the transportation of passengers and freight over navigable waters was in the exercise of a sort of public office, and has public duties to perform. In *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 694, 695, it was adjudged that a railroad, whether constructed by a private corporation

or by individuals under the authority of a legislative grant, or by the state itself, was a public highway, and that the function performed by the corporation was that of the state, and the uses to which its property was devoted were of a public nature.

See also *Queensbury* v. *Culver*, 19 Wall. 83, 91.
Baltimore & Ohio R.R. Co. v. *Maryland*, 21 Wall. 456, 470, 471.
Cherokee Nation v. *Southern Kansas R. Co.*, 135 U.S. 641, 657.
United States v. *Trans-Missouri Frt. Assn.*, 166 U.S. 290, 332.
Smyth v. *Ames*, 169 U.S. 466, 544.
Lake Shore & M.S. R.R. Co. v. *Ohio*, 173 U.S. 285, 301.
Minnesota Rate Cases, 230 U.S. 352, 416.

In *Georgia* v. *Cincinnati Southern R.R. Co.*, 248 U.S. 26, it was held that a grant made by the State of Georgia to a railroad company without consideration was in aid of a public purpose, and not a gratuity within the meaning of the state Constitution.

It has been repeatedly held by this court that to aid in the construction of a railroad is a public purpose for which a municipality may levy and collect taxes whether such aid takes the form of subscription to stock or bonds or whether it is in the form of a donation.

Gelpcke v. *Dubuque*, 1 Wall. 222.
Rogers v. *Burlington*, 3 Wall. 663.
Pine Grove Township v. *Talcott*, 19 Wall. 666, 676.

Anderson v. *Santa Anna Township,* 116 U.S. 356.

Bolles v. *Brimfield,* 120 U.S. 759.

Folsom v. *Township Ninety-six,* 159 U.S. 611.

In *Taylor* v. *Ypsilanti,* 105 U.S. 60, this court sustained the validity of certain bonds issued by the City of Ypsilanti for the purpose of making a donation in aid of the construction of a railroad, using the following language in the course of its opinion:

> "It was said by Mr. Justice Clifford, speaking for the court in *Rogers* v. *Burlington,* 3 Wall. 663, decided in 1865, that the rule that the legislature in the absence of constitutional prohibitions could authorize municipalities to aid in the construction of railways owned and managed by private corporations pervaded the jurisprudence of the United States. We will not at this late day enter upon the vindication of that rule."

Furthermore, it has been assumed without question in recent adjudications of this court that the ownership and operation of a street railway was a public purpose which would justify a municipality in engaging in that business.

United Railroads of San Francisco v. *San Francisco,* 249 U.S. 517.

Detroit United Railway v. *Detroit,* 255 U.S. 171.

Honolulu Transit Co. v. *Hawaii,* 211 U.S. 282.

It is submitted that the foregoing authorities abundantly show that the public operation of the railway company and its properties in the manner provided by Spec. St. 1918, c. 159, was a public purpose for which taxes may be levied, and that the plaintiff's contention upon this point is without merit.

3. The Delegation of Authority to the Trustees to Determine the Allowance for Depreciation, Rehabilitation, Obsolescence, and Losses is Valid.

The provisions of the act with reference to this matter are found in sections 6 and 13, the material parts of which are as follows :

> "Section 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof

during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation."

"SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition."

The dominant purpose of the act was to provide transportation at cost. It is elementary that, in the operation of any business involving the use of depreciable assets, a proper allowance must be made for depreciation as a part of the cost of operation. The law upon this point is stated in *Knoxville* v. *Knoxville Water Co.*, 212 U.S. 1, 13, in the following language:

"A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the begin-

ning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization,—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both."

See also *Stein* v. *Strathmore Worsted Mills*, 221 Mass. 86, 89.

It is submitted that there is no federal question involved in the claim of the plaintiff that the delegation to the trustees of authority to determine the allowances to be made for these items was invalid. The injury suffered by the plaintiff, if any, consisted of the levy of the tax to make up the deficiency resulting from the operation of the railway system. If the purpose for which the tax was levied was a public one, as it is believed has been amply shown to be the case here, it seems clear that this court will not concern itself with the question of whether the legislature properly delegated to a particular board the determination of the amounts to be expended for certain items included within such purpose. This is not a case of where authority has been delegated by the legislature to a subordinate tribunal to make rules, regulations, or orders which may operate to deprive a person of his

property, or the beneficial use thereof, and thereby effect a taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. The delegation here is merely of the power to determine what amounts shall be expended for particular items of expense in the operation of a publicly managed railway system. The plaintiff has no more ground for complaint here than it would have against a tax to provide general revenue on the ground that the authority to determine how the money which was raised by such a tax should be expended was delegated to the various state departments, boards, and commissions. The question of how such authority shall be exercised is one for the state itself to determine, and involves no federal question.

See *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541.
Dreyer v. *Illinois*, 187 U.S. 71, 83.

If, however, it should be deemed that this question is open here, it is submitted that the delegation of authority contained in Spec. St. 1918, c. 159, was valid and proper. The allowance to be made for depreciation, obsolescence, losses, and rehabilitation in this case must almost necessarily be left to the determination of an administrative board. It would have been practically impossible for the legislature to have fixed with any degree of accuracy the definite amount which should be allowed in the cost of service on account of these items. As pointed out by the court in *Knoxville* v. *Knoxville Water Co., supra*, "It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages

with different expectations of life." The court below took cognizance of the fact that the Boston Elevated Railway system furnished the principal passenger transportation service for Boston and its suburbs, and it must be a matter of common knowledge that the property comprising such a system includes a great variety of machinery, appliances, and equipment, which are subject to varying and diverse conditions. The amount which is required for depreciation of these various items is directly dependent upon the state of repair in which they are kept. It will hardly be contended that the determination of the amount to be spent on repairs and maintenance of the property was not a proper matter to be delegated to the trustees. But the determination of the amount to be allowed for depreciation involves a decision of the same kind and is so interwoven and dependent upon the question of repairs and maintenance that it would clearly be impracticable to separate the authority for deciding as to the amount to be allowed for the one or the other.

Similarly, it would be impracticable, if not impossible, for the legislature to fix the definite sum required to make up for obsolescence or for losses in respect to property sold, destroyed, or abandoned. The amount needed for these purposes depends largely upon the invention of new machinery and appliances, the discovery of new and improved methods and processes, and the happening of events which cannot be foreseen. The allowance required on account of these items must in the very nature of the subject be left elastic and subject to the determination of an administrative board familiar with the property and the varying conditions by which it is affected.

The determination of what allowance, if any, should be made for rehabilitation in order that the property may be in good operating condition at the end of the period of public control as required by section 13 involves a decision of exactly the same kind as the determination of the allowance for current depreciation, obsolescence, and losses. It depends upon a multiplicity of details, and must, almost necessarily, be delegated by the legislature.

The delegation of authority to an administrative board to make decisions of this nature does not involve an unconstitutional delegation of power by the legislature, and has been uniformly sustained in the courts of Massachusetts and by the decisions of this court.

Kingman, Petr., 153 Mass. 566.
Codman v. *Crocker*, 203 Mass. 146, 154.
In re Adams, Petr., 165 Mass. 497.
Atty. Gen. v. *Williams*, 174 Mass. 476.
In re de las Casas, Petr., 180 Mass. 471.
Broadbine v. *Revere*, 182 Mass. 598.
In re Met. Park Commrs., Petrs., 209 Mass. 381.
In re Met. Park Commrs., Petrs., 227 Mass. 183.

In several of these cases the delegation of authority concerned the determination and compilation of amounts which were later to be collected as taxes from parties who objected to the constitutionality of such proceedings and whose objections were invariably overruled. Similar instances of the validity of a delegation of authority to determine the cost of certain

specific undertakings and the proper charges therefor have also been sustained in the following cases:

Northampton, Petr., 158 Mass. 299.
Newburyport Water Co. v. *Newburyport*, 168 Mass. 541, 552.
Masonic Bldg. Assn. v. *Brownell*, 164 Mass. 306.
Smith v. *Mayor of Worcester*, 182 Mass. 232.
Boston, Petr., 221 Mass. 468.
Brackett v. *Comm.*, 223 Mass. 119.

This court has repeatedly held that it was within the constitutional power of the legislature to delegate to a subordinate body the authority to fix the rates to be charged by a common carrier.

Atlantic Coast Line R.R. Co. v. *No. Carolina Corp.*, 206 U.S. 1.
Honolulu Rapid Transit Co. v. *Hawaii*, 211 U.S. 282.
Grand Trunk Western R.R. Co. v. *Railroad Comm.*, 221 U.S. 400.
Louisville & Nashville R.R. Co. v. *Garrett*, 231 U.S. 298.

So also it was held in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, that Congress could properly delegate to the Interstate Commerce Commission authority to prescribe a uniform system of accounting and bookkeeping for common carriers.

In *St. Louis &c. R.R. Co.* v. *Taylor*, 210 U.S. 281, it was held that, where Congress had provided that after a given date only cars with draw-bars of uni-

form height should be used in interstate commerce, the administrative duty of fixing a uniform height could properly be left to the Interstate Commerce Commission.

In *Field* v. *Clark*, 143 U.S. 649, where it was held that the tariff act of 1890 was not repugnant to the Constitution as conferring legislative power upon the President because it authorized him to suspend the provisions of the act relating to the free importation of certain commodities, the court quoted with approval from *Locke's Appeal*, 72 Penn. 491, as follows:

> "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

In *Union Bridge Co.* v. *United States*, 204 U.S. 364, it was held that, where Congress had enacted that navigation should be free from unreasonable obstructions arising from bridges of insufficient height, width, or span, or otherwise defective, it was proper to delegate to an administrative officer the power to determine whether a particular bridge was an unreasonable obstruction.

To the same effect are *Buttfield* v. *Stranahan*, 192 U.S. 470; and *In re Kollock*, 165 U.S. 526.

In *Plymouth Coal Co.* v. *Pennsylvania,* 232 U.S. 531, the state law required owners of adjoining coal properties to cause boundary pillars to be left of sufficient width to safeguard the employees, and delegated to an administrative board the determination of the width required. This was held to be a valid delegation of power, notwithstanding the statute provided no appeal from the decision of the board. In this decision the court used the following language, which is applicable to the facts in the instant case:

> "The legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. *United States* v. *Grimaud,* 220 U.S. 506, 517-522, 55 L. ed. 563, 567-569, 31 Sup. Ct. Rep. 480. Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for the regulation of public service corporations are a familiar instance. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U.S. 479, 495, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. And it has become entirely settled that powers and

discretion of this character may be delegated to administrative bodies, or even to a single individual."

In the case at bar the legislature has prescribed a plain rule as to what is to be included in the cost of service in the operation of the railway. This included such allowance as the trustees should deem necessary or advisable for depreciation, obsolescence, and losses. And as to these items the rule is established that it shall be such "that, upon the expiration of the period of public management and operation, the property shall be in good operating condition." It is manifest that in the nature of things it would have been impracticable for the legislature to have defined this allowance with greater precision. There is no essential difference between the delegation of authority to the trustees to determine the allowance to be made for these items and the delegation to them of the authority to determine how much shall be spent for other operating expenses.

It is confidently submitted that the delegation of authority to the trustees which is here complained of was valid and proper, if that question can be treated as open in this court.

4. The Plaintiff's Bill Sets Forth No Facts Showing that the Allowance Made by the Trustees for Depreciation was Illegal or Improper.

It is submitted, at the outset, that the allegations of the bill present no federal question upon this point, for the reasons above given. If, however, this question should be regarded as open here, it seems clear

that no facts are set forth to show that the allowances complained of were illegal or improper.

The allegations are that "The trustees have charged for depreciation for the fiscal year ending June 30, 1919 the sum of approximately $2,000,000. and have charged for maintenance and repairs approximately $2,300,000"; that the company had previously charged only $98,000 per year for depreciation and an amount for maintenance and repairs "far less than the amount which the trustees have charged"; that, owing to such "inadequate allowances for depreciation" and "failure to use sufficient money for maintenance and repairs," the property "was badly run down and depreciated and owing to this condition the trustees felt it incumbent upon themselves in the performance of their duties" to make these charges "in order in large part at least to make up for this neglect of the company in the past"; that the amounts so charged are "excessive, unreasonable, unnecessary and illegal," and that the cost of service, the deficiency required from the Commonwealth, and the assessment of its proportion upon the city are correspondingly "excessive, unreasonable, unnecessary and illegal."

The allegations as to the amount which had been allowed in the past by the company while under private management for depreciation and maintenance are entirely irrelevant so far as they purport to establish a proper standard for these charges, as according to the plaintiff's own allegation these amounts were so inadequate and insufficient that as a result the property was "badly run down and depreciated."

The fact as alleged that the property was greatly depreciated must be presumed to have been within the

contemplation of the legislature when Spec. St. 1918, c. 159, was enacted. The rehabilitation of the property which is authorized by section 13, so far as it may be required in order to return the property to the company at the expiration of public control "in good operating condition," was one of the terms of the agreement embodied in this act. This provision for rehabilitation, as well as the provisions relating to depreciation and other items specified in "the cost of service," is in the nature of compensation to be made for the use of property, and in no sense constitutes a gratuity to the company or its stockholders. The amount of compensation for the use of this property was a matter for the legislature to determine, and by the enactment of this law the legislature did determine that these provisions amounted to reasonable compensation for the use of the property, the operation of which was taken over by the Commonwealth.

Fletcher v. *Peck*, 6 Cranch, 87.
United States v. *Des Moines &c. Co.*, 142 U.S. 510, 543.
New Orleans v. *Warner*, 175 U.S. 120, 145.
Hamilton v. *Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161.
Green v. *Frazier*, 253 U.S. 233.

The general allegations that the amounts charged by the trustees were "excessive, unreasonable, unnecessary and illegal" are statements of legal conclusions merely, which are not admitted by the demurrer. As stated by the court below—

"The general averments 'excessive, unreason-

able, unnecessary and illegal,' standing alone and without statement of definite acts or facts which might accurately be described by such expletives, are of no consequence and do not merit judicial inquiry, and of course are not admitted by the demurrers. *Nichols* v. *Rogers*, 139 Mass. 146. *Butler* v. *Directors of the Port of Boston*, 222 Mass. 5, 8. *Lothrop Publishing Co.* v. *Lothrop, Lee & Shepard Co.* 191 Mass. 353. *Marsch* v. *Southern New England Railroad*, 230 Mass. 483, 494. The facts specifically set forth show nothing rendering the assessment of the deficiency contrary to any constitutional guaranty."

This is also a well-settled rule in this court.

Dillon v. *Barnard*, 21 Wall. 430, 437.
United States v. *Ames*, 99 U.S. 35, 45.
Pullman Co. v. *Mo. Pacific R.R. Co.*, 115 U.S. 587, 591.
Fogg v. *Blair*, 139 U.S. 118, 127.
Kent v. *Lake Superior Co.*, 144 U.S. 75, 91.

Furthermore, the bill does not allege that the trustees acted in bad faith in making these charges. Indeed, the bill expressly states that "the trustees felt it incumbent upon themselves in the performance of their duties" to do so.

It is submitted that there is nothing in this case entitling the plaintiff to complain of the charges made by the trustees for depreciation, obsolescence, or rehabilitation.

5. The Assessment upon the City Here Complained of did Not Take the Rents or Other Benefits to Which the City was Entitled under Its Contracts with the Company nor Impair the Obligations Contained in Such Contracts or Embodied in St. 1902, c. 534, and St. 1911, c. 741.

It appears from the allegations of the bill that under the provisions of Sts. 1902, c. 534, and 1911, c. 741, the city was entitled to hold the several subways and tunnels and the rents and profits from their use in its private and proprietary capacity, and that the Commonwealth could not take the same except on payment of just compensation. It further appears that these subways and tunnels are under lease to the company at a specified rental and under agreements whereby the company is required to make the necessary repairs, with certain exceptions.

The claim of the plaintiff is that, inasmuch as the cost of service upon which the deficit in question was determined included the rental paid for these subways and tunnels and the cost of the repairs required to be made by the company under these leases, the assessment of any part of the resulting deficit upon the city through taxation amounts to a taking of the rentals and cost of repairs to which the city is entitled, and therefore impairs the obligation of said leases and of the contracts alleged to be embodied in the Acts of 1902 and 1911. It is manifest that the claim of the city is unsound, for the following reasons:

(*a*) The assessment is in no sense laid upon Boston in its proprietary capacity. That city is merely used for convenience as a taxing district for the assessment and collection of taxes upon and from per-

sons and estates within its limits, and in this its functions are exclusively governmental. As stated by the court in its opinion, "The circumstance that an existing municipal governmental agency was used for the assessment and collection of a tax for a public purpose gives that existing governmental agency as far as it has private proprietary rights no ground for just complaint."

Indeed, the city in its proprietary capacity was not affected at all by this tax, since property belonging to the city is not subject to local taxation.

Rossire et al. v. *Boston*, 86 Mass. 57.
Burr v. *Boston*, 208 Mass. 537.

The full and complete power which the state has over a municipality in its governmental capacity was stated by this court in *Hunter* v. *Pittsburgh*, 207 U.S. 161, in the following language:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing

them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

(*b*) Even if Boston were assessed in its private and proprietary capacity, such assessment would not take or affect in any way the rental or other benefits to which the city is entitled under its contracts or leases with the company. This is graphically shown by the following illustration used by the court below in its opinion:

"Boston in its proprietary character as owner, entitled to rent of its property leased to the railway company, has no more legal ground to complain of taxes assessed upon its inhabitants for the maintenance of a transportation service than has the owner of a public bond taxed in part to pay interest on public bonds, or the owner of a parcel of real estate taxed in part to pay damages

caused by the taking from him of another parcel for some public use. Private individuals owning property leased to the railway company would have equal cause for complaint with respect to taxes assessed upon them."

There is nothing in St. 1902, c. 534, or St. 1911, c. 741, which exempts the city from liability to taxation for the purpose of defraying the deficit between the income of the railway company and the cost of service while under public control. It is well settled that the state will not be held to have surrendered its power to levy and collect taxes unless its intention to do so has been declared in clear and unmistakable terms. Exemption from taxation is never to be inferred or presumed.

Providence Bank v. *Billings*, 4 Pet. 514.
Union &c. R.R. Co. v. *Philadelphia*, 101 U.S. 528.
New Orleans City R.R. Co. v. *New Orleans*, 143 U.S. 192.
St. Louis Ry. Co. v. *St. Louis*, 210 U.S. 266.

6. Spec. St. 1918, c. 159, did Not Effect or Authorize the Taking of Any Property of the Plaintiff.

The court below assumed in favor of the city that its interest in the subways and tunnels could not be taken by the Commonwealth or other public agency without making just compensation to the city. On the other hand, it held that there was nothing in the act which made a taking or authorized any to be made of the property of the city. The court analyzed the provisions of sections 1 and 2, upon which the claim of the

city in this respect is predicated, and stated their meaning in the following language:

> "The trustees are directed in c. 159, by § 1, to 'assume the management and operation of the company's property,' and by § 2, to 'manage and operate the Boston Elevated Railway Company * * * and the properties owned, leased, or operated by it.' These phrases manifestly do not authorize any taking of the subways or tunnels. The trustees must assume control of the rights of the railway company under its leases, but they can go no further than that. By § 2, the trustees, 'subject to the provisions of this act, shall take and have possession of said properties in behalf of the Commonwealth during the period of public operation.' As matter of grammatical construction, the word 'take' in this context has for its object the word 'possession'. It is not used in the sense of expropriate or seize under eminent domain. The phrase means that the trustees shall take possession and continue to have possession of the properties under the terms of the act. That a possessory right only is intended is clear from the subsequent clause in § 2, to the effect that 'In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees * * * shall be deemed to be acting as agents of the company. * * * ' The description of the properties, possession of which the trustees are to take and hold, is not broad enough to include anything more than the rights of the railway company

therein. It does not go far enough to include underlying ownership where the company has only a leasehold interest. The words of the statute fall short of empowering the trustees to take the subways under eminent domain. The act as a whole makes plain that no seizure by eminent domain is contemplated. That power is recognized in § 13 as not having been exercised and the existence of the possibility of its exercise in the future is there avowed."

"The act neither constitutes nor authorizes a taking, either in the present or suspended until or operative upon, the expiration of the leases in 1936. The trustees have not acquired and have no power to obtain any higher or other rights in the subways and tunnels than the railway company owns. The circumstance that under § 12 the period of public control may extend beyond the time when the leases expire in 1936 is of no consequence in this connection. The trustees will have no greater right in the subways and tunnels after the expiration of the leases than the railway company would have."

It is manifest that the court adopted the only reasonable construction which could be placed upon the provisions of the act. The result of any other interpretation would be absurd. The construction contended for by the plaintiff would mean that, where the company had leased quarters in private buildings for offices, waiting-rooms, or other purposes, the act effected a taking of the fee in these quarters and the

owners were deprived of their property without compensation.

It is not necessary, however, to consider the reasonableness of the construction adopted by the court below, as the rule is well established that this court will not disturb the construction which the highest court of the state has placed upon a state statute as to a state matter. As stated by this court in *Quong Ham Wah* v. *Industrial Accident Comm.*, 255 U.S. 445:

> "All the assignments and contentions made rest, in their last analysis, upon the assumption that, despite the construction of the statute made by the court below, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. *Commercial Bank* v. *Buckingham*, 5 How. 317, 342, 12 L. ed. 169, 181; *Johnson* v. *New York L. Ins. Co.* 187 U.S. 491, 496, 47 L. ed. 273, 275, 23 Sup. Ct. Rep. 194; *Ross* v. *Oregon*, 227 U.S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; *Ireland* v. *Woods*, 246 U.S. 323, 330, 62 L. ed. 745, 750, 38 Sup. Ct. Rep. 319; *Stadelman* v. *Miner*, 246 U.S. 544, 62 L. ed. 875, 38 Sup. Ct. Rep. 359; *Erie R. Co.* v. *Hamilton*, 248 U.S. 369, 371, 372, 63 L. ed. 307, 308, 39 Sup. Ct. Rep. 95. It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivo-

lous, and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. *Farrell* v. *O'Brien* (*O'Callaghan* v. *O'Brien*) 199 U.S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; *Goodrich* v. *Ferris*, 214 U.S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; *Toop* v. *Ulysses Land Co.* 237 U.S. 580, 583, 59 L. ed. 1127, 1128, 35 Sup. Ct. Rep. 739; *Sugarman* v. *United States*, 249 U.S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191; *Berkman* v. *United States*, 250 U.S. 114, 118, 63 L. ed. 877, 884, 39 Sup. Ct. Rep. 411; *Piedmont Power & Light Co.* v. *Graham*, 253 U.S. 193, 64 L. ed. 855, 40 Sup. Ct. Rep. 453.

"True, it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it, and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon."

The city cannot complain that the trustees or the

Commonwealth have acquired the interest of the company in the subways and tunnels. It is not alleged in the bill that there was any provision in the leases from the city to the company against an assignment by the company of its rights thereunder. It is well settled that, under a lease which contains no covenant against assignment, the rights of the lessor are not impaired by an assignment of the lease or subletting of the premises.

Jones, Landlord & Tenant, sec. 431.
Taylor, Landlord & Tenant (7th ed.), sec. 402.
Patten v. *Deshon*, 1 Gray, 325, 330.
Church v. *Brown*, 15 Ves. Jr. 258.
Wainwright v. *Bankers &c. Co.*, 112 Va. 630.

The city loses no rights under this assignment, for, as pointed out by the court below, considering the trustees as representatives of the Commonwealth, the city would have the same right to maintain a writ of entry against the Commonwealth as against the railway company both before and after the expiration of the lease.

Mass. G.L. c. 237, sec. 2; c. 245, secs. 9, 12.

In reality all that has occurred so far as the subways and tunnels are concerned is a change of management on the part of the lessee. It is obvious that this change of management in no way constitutes a taking of the property of the city.

7. THE PROVISIONS OF SPEC. ST. 1918, C. 159, AUTHORIZING THE ASSESSMENT UPON THE PLAINTIFF ARE NOT ARBITRARY OR UNREASONABLE.

The rightful power of the legislature to distribute public burdens or duties, and in consequence to apportion the expense of public undertakings amongst and between cities and towns which it deems to benefit thereby or to be reasonably chargeable with a duty or burden, is settled by a uniform line of decisions in Massachusetts and in this Court.

Hingham & Quincy Bridge v. *Norfolk*, 6 Allen, 353-358.
Kingman, Petr., 153 Mass. 566, 572.
Boston, Petr., 221 Mass. 468, 473, 478.
Opinion of the Justices, 234 Mass. 612.
Williams v. *Eggleston*, 170 U.S. 304.
Thompson v. *Perrine*, 103 U.S. 806.
New Orleans v. *Clark*, 95 U.S. 644.
Guthrie National Bank v. *Guthrie*, 173 U.S. 528.

In *Kingman, Petr., supra,* at page 573, it is said:

"The Legislature may properly determine that the whole or a part of the cost shall be borne by the Commonwealth, or it may impose it wholly upon counties, or wholly upon towns, or a part upon each. And in doing so it is not necessarily limited by county or town lines. Indeed, as has often been declared, the Legislature may change county or town lines at will, and may provide how their respective properties and debts shall be shared and adjusted." (Citations) "Instead

of changing lines, the Legislature may apportion the burdens in such a manner as will tend to secure fairness and equality. Absolute equality in the distribution of burdens of course is not to be hoped for. But with a view to the nearest approach to it that is possible, the Constitution wisely vests a large and general power in the Legislature."

In *Houck* v. *Little River District,* 239 U.S. 254, the court stated the law upon this point in the following language:

"In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the state might have defrayed the entire expense out of state funds raised by general taxation, or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *Mobile County* v. *Kimball,* 102 U.S. 691, 703, 704. It was equally within the power of the state to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state Constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assess-

ment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. *Hagar* v. *Reclamation Dist.* 111 U.S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Spencer* v. *Merchant*, 125 U.S. 345, 353, 356, 31 L. ed. 763, 766, 767, 8 Sup. Ct. Rep. 921; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U.S. 112, 167, 168, 41 L. ed. 369, 391, 392, 17 Sup. Ct. Rep. 56; *Bauman* v. *Ross*, 167 U.S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; *Parsons* v. *District of Columbia*, 170 U.S. 45, 52, 42 L. ed. 943, 946, 8 Sup. Ct. Rep. 521; *Williams* v. *Eggleston*, 170 U.S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Norwood* v. *Baker*, 172 U.S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; *French* v. *Barber Asphalt Paving Co.* 181 U.S. 324, 343, 45 L. ed. 879, 889, 21 Sup. Ct. Rep. 625; *Wight* v. *Davidson*, 181 U.S. 371, 379, 45 L. ed. 900, 904, 21 Sup. Ct. Rep. 616; *Wagner* v. *Leser*, decided this day (239 U.S. 207, ante, 230, 36 Sup. Ct. Rep. 66)."

See also *Dane* v. *Jackson*, 256 U.S. 589.

It is obvious that there is nothing arbitrary or unreasonable in the manner in which Spec. St. 1918, c. 159, authorized the tax to be levied. The tax complained of is in no way levied by reason or virtue of the existence of the subways or tunnels. It falls ratably upon the cities and towns benefited by the operation of the system without regard to where the subways and tunnels are located.

The district created in the present case consists of the cities and towns in which the company operates (sec. 14). It is self-evident that a district so constituted is based upon reason and an honest attempt to deal fairly with the subject.

The basis of apportionment between the cities and towns constituting the district is in proportion to the number of persons in said cities and towns using the services of the company at the time any payment is made.

It needs no argument to show that this case does not come within the limitation laid down in *Norwood* v. *Baker*, 172 U.S. 269, and *Myles Salt Co.* v. *Board of Commissioners*, 239 U.S. 478, where there was a plainly arbitrary and confiscatory apportionment of the cost of a public improvement, as it would be difficult, if not impossible, to imagine a more reasonable or fairer method of apportionment than is provided in the statute here in question.

For the foregoing reasons it is confidently submitted that there was no error in the decision of the court below, and that its judgment should be affirmed.

Respectfully submitted,
H. WARE BARNUM,
Counsel for Defendants in Error, James F. Jackson et als., Trustees of the Boston Elevated Railway Company.

CHARLES W. MULCAHY,
Of Counsel.

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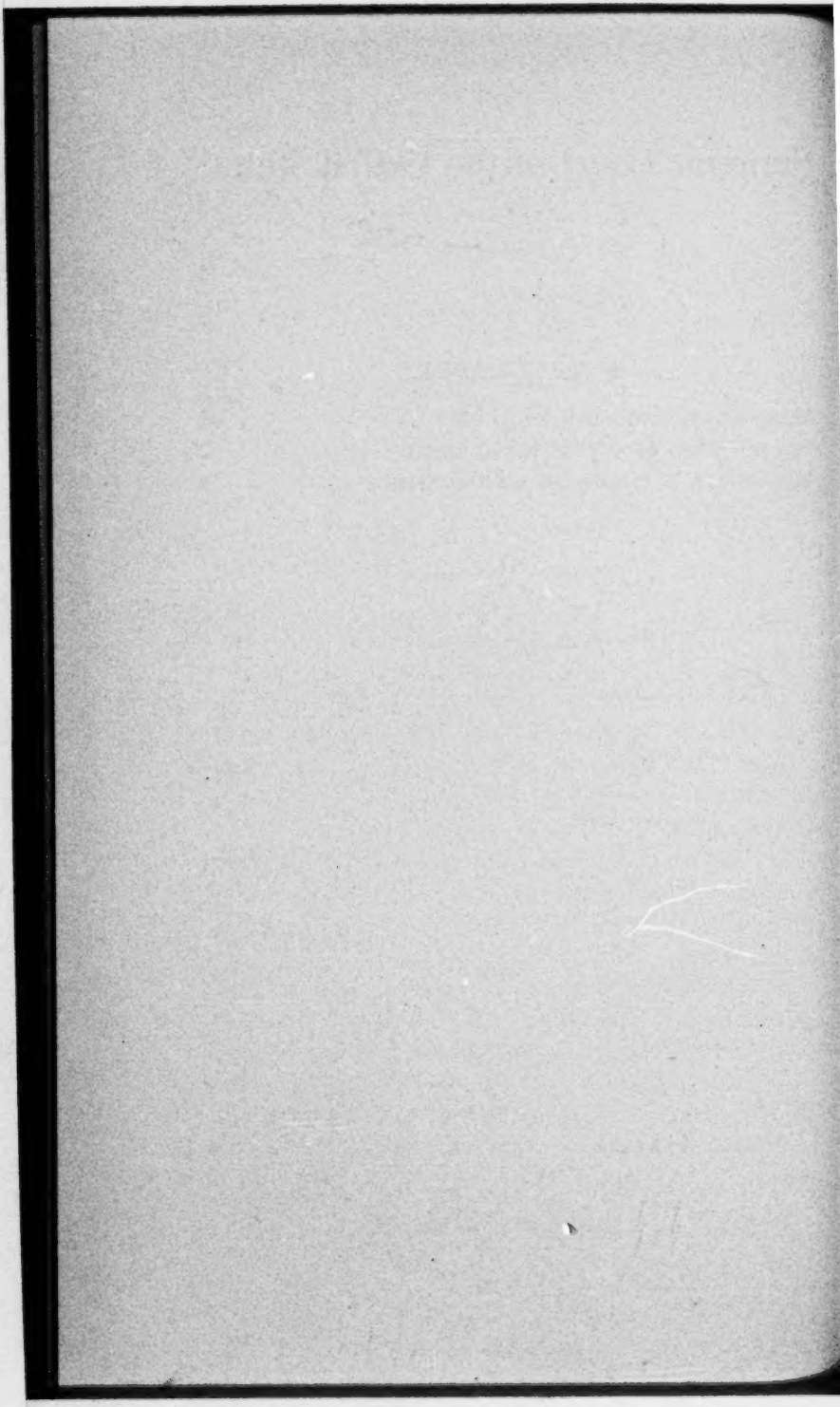

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 141.

THE CITY OF BOSTON, *Plaintiff in Error,*

v.

JAMES JACKSON, *Treasurer and Receiver General of the Commonwealth of Massachusetts;* JAMES F. JACKSON, SAMUEL L. POWERS, *et al., Trustees, etc., et al.*

SUPPLEMENTAL BRIEF OF THE CITY OF BOSTON RE SPECIFICATION OF ERRORS.

Purpose of Supplemental Brief.

The city of Boston, in opposition to the motion (filed August 28, 1922) of the Attorney General of the Commonwealth of Massachusetts to dismiss or affirm, submitted on November 10, 1922, its brief entitled: "Brief of the City of Boston *re* Motion of James Jackson to Dismiss or Affirm."

As the case would probably be called for argument in about two weeks, the city of Boston on November 13, 1922, submitted the above-mentioned brief as its brief on the merits.

This brief does not contain a specification of errors as required by rule twenty-one.

The purpose of this supplemental brief is to comply with this rule, specify the errors and give references to the argument contained in the "Brief of the City of Boston *re* Motion of James Jackson to Dismiss or Affirm."

Specification of Errors Relied Upon.

1. The court erred in refusing to hold that the provisions of chapter 159 of the special acts of 1918, authorizing the assessment through taxation upon the plaintiff in the manner provided for in said act and under the circumstances and facts as described and set forth in the plaintiff's bill of complaint as amended, were palpably unconscionable, arbitrary and unreasonable and in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts and embodied in chapter 534 of the acts of 1902 and chapter 741 of the acts of 1911. Assignment of Error No. 1, R. p. 29.

2. The court erred in holding constitutional the provisions of chapter 159 of the special acts of 1918, authorizing the assessment through taxation of the deficit resulting from the operation of the Boston Elevated Railway Company by the trustees appointed under the said special acts of 1918 in part upon the plaintiff, which deficit, among other items, included the rents received under the subway leases by the plaintiff from the Boston Elevated Railway Company, which rents are, by virtue of prior contracts embodied in chapter 534 of the acts of 1902 and chapter 741 of the acts of 1911 between the plaintiff and Commonwealth of Massachusetts, held by the plaintiff in its private or proprietary capacity and are never to be taken by the

commonwealth except on the payment of just compensation; and in holding that said provisions were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law, and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911. Assignment of Error No. 5, R. p. 30.

3. The court erred in holding constitutional the provisions of chapter 159 of the special acts of 1918, authorizing the assessment through taxation of the deficit resulting from the operation of the Boston Elevated Railway Company by the trustees appointed under the said special acts of 1918 in part upon the plaintiff, which deficit, among other items, included the rents received under the subway leases by the plaintiff from the Boston Elevated Railway Company, which rents are by virtue of chapter 534 of the acts of 1902 and chapter 741 of the acts of 1911 held by the plaintiff in its private proprietary capacity and are never to be taken by the commonwealth except on the payment of just compensation; and in holding that said provisions were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws. Assignment of Error No. 6, R. p. 30.

4. The court erred in holding constitutional the provisions of chapter 159 of the special acts of 1918,

authorizing the assessment through taxation of the deficit resulting from the operation of the Boston Elevated Railway Company by the trustees appointed under said special acts of 1918 in part upon the plaintiff, which deficit, among other items, included the cost of repairs which under the terms of the leases or contracts previously entered between the plaintiff and the Boston Elevated Railway Company were to be made by the said company; and in holding that said provisions were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of the said leases or contracts between the plaintiff and the said company and the contracts previously entered into between the plaintiff and the Commonwealth of Massachusetts, embodied in the aforesaid acts of 1902 and 1911. Assignment of Error No. 7, R. pp. 30-31.

5. The court erred in dismissing the bill of complaint as amended, thereby depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and impairing the obligation of the contracts previously entered into by the plaintiff, contrary to section 10 of article 1 of the Constitution of the United States. Assignment of Error No. 10, R. p. 31.

6. The court erred in refusing to hold that the provisions of chapter 159 of the special acts of 1918 assessed through taxation the plaintiff for unreasonable

and private purposes for the benefit of a private corporation and were in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between the plaintiff in error and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911. Assignment of Error No. 2, R. p. 29.

7. The court erred in holding and deciding that the provisions of chapter 159 of the special acts of 1918, authorizing the trustees in their absolute discretion and without limitation to determine an allowance for depreciation, rehabilitation, and for obsolescence and losses in respect to property sold, such allowance to be charged in the cost of service and included in the deficit to be paid ultimately in great part by the plaintiff, were not in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between said plaintiff and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911 and of certain contracts or leases previously entered into between said plaintiff and the Boston Elevated Railway Company. Assignment of Error No. 3, R. p. 29.

8. The court erred in holding and deciding that the amount charged by the trustees for depreciation in

the manner and under the circumstances as set forth in the bill of complaint and included in the deficit as described in the preceding assignment of error was not unreasonable, illegal, and in violation of the Fourteenth Amendment to the Constitution of the United States as depriving the plaintiff of its property without due process of law and denying it the equal protection of the laws, and of section 10 of article 1 of the Constitution of the United States as impairing the obligation of the contracts previously entered into between said plaintiff and the Commonwealth of Massachusetts and embodied in the aforesaid acts of 1902 and 1911 and of the contracts or leases previously entered into between said plaintiff and the Boston Elevated Railway Company. Assignment of Error No. 4, R. pp. 29-30.

References to Argument on the Errors.

The specifications of error numbered 1 to 5, inclusive, are argued on pages 43 to 62 of the city of Boston's brief on the motion to dismiss or affirm.

Specifications of error numbered 6-8, inclusive, are argued on pages 62 to 67 of the city of Boston's brief on the motion to dismiss or affirm.

Respectfully submitted for the city of Boston, plaintiff in error,

By E. Mark Sullivan,
Corporation Counsel.
Joseph P. Lyons,
Asst. Corp. Counsel.

Nathan Matthews,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1922

No. 141

CITY OF BOSTON, *Plaintiff in Error*

v.

JAMES JACKSON, TREASURER AND RECEIVER GENERAL, JAMES F. JACKSON AND OTHERS, TRUSTEES, ETC., AND BOSTON ELEVATED RAILWAY COMPANY

BRIEF IN BEHALF OF THE BOSTON ELEVATED RAILWAY COMPANY

STATEMENT OF THE CASE

This was a bill in equity brought by the City of Boston in the Supreme Judicial Court of Massachusetts against the Treasurer of the Commonwealth of Massachusetts, the Boston Elevated Railway Company and the Trustees of that company appointed under the provisions of Chapter 159 of the Special Acts of Massachusetts of 1918. The purpose of the bill was to have that act of the legislature "declared unconstitutional and null and void," the other forms of relief prayed for being merely incidental to that. (See Prayers of Bill, Record, p. 9.)

The defendants all filed demurrers, and the precise question before the court for determination was, therefore, whether the bill stated a case which entitled the plaintiff to relief in equity.

The Supreme Judicial Court for the Commonwealth ordered the entry of a decree sustaining the demurrers and the bill was accordingly dismissed (Record, p. 17).

The only allegations of fact contained in the bill, in addition to those which set forth the enactment of certain earlier statutes, the making of certain leases, the enactment of this statute and the carrying into effect of the general scheme embodied in it, are found in Paragraphs 3, 4, 5, 6 and 12. In substance these additional allegations of fact amount to this:—

That the deficiency to be paid by the Commonwealth was about $4,000,000 (Paragraph 3).

That the Trustees have made charges of approximately $2,000,000 for depreciation, and $2,300,000 for repairs and maintenance, for the fiscal year just ended (Paragraph 4).

That the company had in the past made "inadequate allowances for depreciation," and "failed to use sufficient money for maintenance and repairs," and, therefore, "the trustees felt it incumbent upon themselves in the performance of their duties to charge in one year the sums hereinbefore stated as charged for depreciation and for maintenance and repairs" (Paragraph 5).

That the amounts so charged "are excessive, unreasonable;" and "unnecessary," and, therefore, the "cost of service" is also (Paragraph 6).

That, when the act was passed, the company was in financial difficulties, its credit impaired and its property depreciated in value.

The bill and the plaintiff's Assignment of Errors seem intended to attack the constitutionality of the act upon the following grounds:—

(I) That an Act having this general scope and purpose is beyond the power of the Legislature.

(II) That the Act impairs the obligations of certain contracts.

(III) That it "deprives the said City and its taxpayers of their property without due process of law" (Paragraph 12).

(IV) That it provides for an "arbitrary and unreasonable delegation of legislative authority" (Paragraph 11).

(V) That it denies to the City the "equal protection of the Laws" (Paragraph 12).

These propositions of law will now be discussed in the order in which they have been stated.

ARGUMENT

I. An Act having this General Scope and Purpose was within the Power of the Legislature

Just what the general scope and purpose of the act are cannot be better stated than in the language of the Massachusetts court. The "Opinion of the Justices," furnished to the Senate in April of 1919, begins with what purports to be a summary of this statute, in the following language:—

> "That act was in substance and effect a taking over of the Boston Elevated Railway by the Commonwealth for operation for a limited period of ten years and possibly for a longer period under some circumstances, upon condition that its terms should be accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company and of the West End Street Railway Company and upon the further condition that the Boston Elevated Railway Company should provide for raising $3,000,000 by the issuance of that amount of new and preferred stock. Two main purposes of that act were (1) to provide for the establishment of rates of fares which should be adequate to pay the cost of performing the service furnished by the Commonwealth through using the property of the Boston Elevated Railway Company as that cost was defined in sec. 6, and (2) to make an agreement for the payment of the rental for the use of the Boston Elevated Railway Company and its property by the Commonwealth by agreement with the companies interested to be manifested by acceptance by their stockholders. That rental was fixed by sections 5 and 6 at payment not exceeding seven per cent on the preferred stock and by payment of dividends on the common stock of five per cent for the first two years, five and one half per cent for the succeeding two years, and six per cent for the remainder of the period of public operation. The chief

design of that act was to provide by public operation for fares at rates sufficient to meet all costs of furnishing the service.

"In sec. 11 provision was made for the advancement of moneys by the Commonwealth (to be assessed upon the cities and towns enjoying the service) to maintain the reserve fund. But that was rather an incidental provision to tide over the affairs of the company until the fundamental idea of rates adequate to meet the cost of the service could be established and the habits of the travelling public could become adjusted thereto. That act was accepted by the stockholders of the two corporations and the new stock has been subscribed. Thus the act has become operative according to its terms and constitutes a contract between the parties as set forth in sec. 18."

Opinion of the Justices, 231 Mass. 603, at pp. 607, 608.

"In essence Spec. Acts 1918, c. 159, was a legislative agreement for the lease to the Commonwealth of a public utility to be operated for a limited time by public officers upon the payment of fair rental on an investment made under public supervision and under laws prohibiting stock watering or other means of inflation."

Opinion of the Justices, 231 Mass. 609.

A further analysis of the act is found in the opinion of the Massachusetts court in this case (Record, pp. 20, 21).

Plainly, the fundamental question presented is whether the legislature had the right to impose taxes upon the City of Boston and certain adjacent cities and towns for the purpose of making good the deficiency which might result from operating the railways of the Boston Elevated Railway Company through the instrumentality of the Trustees appointed under this act, upon the terms and conditions therein provided for. This question may be more definitely and concretely stated as being whether the legislature has

the power to provide that the State shall "carry such persons as desire to ride upon the Boston Elevated Railway, at less than cost and assess the rest of that cost upon the public by taxation" (*Opinion of the Justices*, 231 Mass. 611).

The answer to the question depends upon whether the money thus raised by taxation and spent can fairly be considered as raised and spent for a public purpose, for the public service, or for some object which concerns, or promotes, the public welfare.

It is submitted that the convenient, wise and economical operation of the system of local transportation in and about Boston, the capital and the business centre of the State, which, with its immediate suburbs, comprises an enormous proportion of the entire population of the Commonwealth and of its taxable property, and is at the same time its principal city and seaport (such operation being by public officers appointed by the Governor, and in the interests of the travelling public), is a public purpose. That this may also involve some element of benefit to private individuals cannot deprive the general scheme of its public purpose.

See,—

Opinion of the Justices, 231 Mass. 603.

The power of the legislature to raise money by taxation for public purposes which may involve such incidental private advantages has frequently been upheld by the courts.

See, as to—

Construction of Sewers:—

Carson v. *Brockton*, 175 Mass. 242; 182 U. S. 398.

Sayles v. *Public Works of Pittsfield*, 222 Mass. 93.

Construction of Markets,—

Spaulding v. *Lowell*, 23 Pick. 71.

Maintaining Public Baths,—

Bolster v. *Lawrence*, 225 Mass. 387.

Removal of Ashes,—

Haley v. *Boston*, 191 Mass. 291.

Maintaining Ferries:—

Attorney General v. *Boston*, 123 Mass. 460.
Davies v. *Boston*, 190 Mass. 194.

Other instances are:—

Willard v. *Newburyport*, 12 Pick. 228,—Public Clock.
Lumbard v. *Stearns*, 4 Cush. 60,—Water Works.
Commonwealth v. *Williamstown*, 156 Mass. 70, —Railroad.
Kittredge v. *No. Brookfield*, 138 Mass. 286,—Railroad.
Prince v. *Crocker*, 166 Mass. 347,—Subway and Public Park.
Browne v. *Turner*, 176 Mass. 9,—Tunnel for a Street Railway.

See, also,—

Worcester v. *Western R.R. Corporation*, 4 Met. 564.

That the construction of the subways to be used by the street railways was a public purpose was already the established law of Massachusetts.

Prince v. *Crocker*, 166 Mass. 347, at p. 361.
Browne v. *Turner*, 176 Mass. 9.

If the construction of a subway for the purposes of local transportation by means of street railways is a public purpose, obviously such transportation must itself be also a public purpose.

The right to tax in aid of a railroad is well established in our law and was recognized by the Supreme Court of the United States in *Olcott* v. *The Supervisors,* 16 Wall. 678, where it was said (at page 695) that "whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. . . . No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public."

The allegations of the bill as to the benefit to the owners of the Boston Elevated Railway Company and the effect of the act upon the market value of its stock are immaterial, such benefits being merely incidental to the general public purpose of the legislation.

Nor can the court undertake to inquire into the motives of the legislature when the action taken is within the scope of its powers.

Brayton v. *Fall River,* 124 Mass. 95.

There can be no difference in principle between laying taxes and using the money so raised for the original construction of some public utility and using it to help in the operation or rehabilitation of it. The power to tax and to expend depends in both cases upon the public character and purpose of the use.

> "If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it."
>
> *Carson* v. *Brockton,* 175 Mass. 242, at p. 244.

Moreover, it is well established in the jurisprudence of this court that

> "a decision of the highest court of a state declaring a use to be public in its nature will be accepted unless clearly not well founded."
>
> *Jones* v. *City of Portland*, 245 U. S. 217, 221.

In *Green* v. *Frazier*, 253 U. S. 233, this principle is clearly enunciated, in this language:—

> "In that case *(Jones* v. *City of Portland)* we reiterated the attitude of this court towards State legislation and repeated what had been said before that what was or was not a public use was a question concerning which local authority, legislative and judicial, had a special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the state declaring a given use to be public in its nature would be accepted by this Court unless clearly unfounded."

Accordingly, the court proceeded to decide that certain acts of the legislature of North Dakota, providing for public operation of a bank, the building of houses for residence purposes, the building of mills and elevators, all by means of funds raised by means of taxation, were not in conflict with the Fourteenth Amendment.

The Supreme Judicial Court of Massachusetts has certainly decided specifically that the public operation of the Boston Elevated Railway Company under this act is a public purpose (Record, p. 21), Rugg, C. J., saying,—

> "The public operation is undertaken by the Commonwealth not as a source of profit, but solely for the general welfare";

and again (Record, p. 26),—

> "This is an exercise of the power of taxation. The purpose for which it is put forth is a public purpose."

This is clearly a decision of the highest court of the State of Massachusetts to the effect that the taxation authorized by this act was for a public purpose. Moreover, that decision is entirely in accord with previous decisions of that court, as illustrated by the authorities cited by Rugg, C. J., in the opinion (Record, pp. 21, 22).

II. The Act does not impair the Obligation of any Contract

The bill alleges that there are contracts between the plaintiff and the Commonwealth and between the plaintiff and the Boston Elevated Railway Company, the obligations of which are impaired by the provisions of the act (Paragraph 9).

The contracts with the Commonwealth are alleged to arise out of the acceptance by the plaintiff of Chapter 534 of the Acts of 1902 and Chapter 741 of the Acts of 1911 and the specific provisions to which attention is directed by the bill in this connection are those which provide for the ownership of the subways and tunnels by the City "in its private or proprietary capacity for its own property" and for the receipt by it of the "rents, tolls, income and profits" derived from the use of them.

(*a*) *As to Contracts with the Commonwealth*

Assuming that a contract does exist between the plaintiff and the Commonwealth and is protected by the clause of the Federal Constitution prohibiting impairing the obligations of contracts, there is no provision of the present act which, either by its express terms or by its practical effect, alters the terms of that contract, or changes in any respect the rights or remedies available to the plaintiff for enforcing it. The ownership of the subways clearly remains with the City, in its private or proprietary capacity. The plaintiff is in no respect limited in exercising its rights of ownership in these structures. The act affects only the *leasehold interests* which are the *property of the Boston Elevated Railway Company,* the possession and management of which the Trustees have and hold "in behalf of the Commonwealth during the period of public operation" (Section 2 of the Act of 1918), and in the man-

agement of which the act provides that the Trustees " . . . shall be deemed to be acting as agents of the company and not of the Commonwealth . . : " (Section 2). It is only the possession of the company's leasehold interests in the subways which has been given to the Trustees, and the act does not even purport to transfer to the Trustees the ownership of those leasehold interest themselves, or to divest the Boston Elevated Railway Company of the leaseholds.

The provision for a possible continuance of public operation beyond the time when the leases may be terminated by the City would not, and could not, prevent the City from terminating the leases and regaining possession of the subways in the manner provided for by their terms. The Trustees are given no greater rights in the subways and tunnels after the expiration of the leases than the railway company would then have.

See, *Opinion of Massachusetts Court* (Record, p. 26, Paragraph 3).

(b) As to Contracts between the City and the Boston Elevated Railway Company

The bill alleges that the obligations of the plaintiff's contracts with the Boston Elevated Railway Company which have been impaired are those providing for payment of rentals and for the repair and maintenance of the subways, and also the provision for entering in case of default.

A careful analysis of the act discloses no provision of it which has any direct bearing upon these contracts or any of their obligations. Clearly the act does not permit the Boston Elevated Railway Company to pay to the plaintiff any less rent than the amounts specified in the leases, nor does it modify the obligation of the Boston Elevated Railway Company with reference to repairs an[illegible]

maintenance. Nor does the fact that the Trustees appointed under the act have possession as agents of the company in any way relieve the company from these obligations, or interfere with the legal or equitable remedies of the City for the enforcement of its rights under the leases. On the contrary the act not only makes the Trustees agents of the company, but expressly provides in Section 3 that "the Trustees shall cause to be paid all amounts which may from time to time become due from the company . . ." etc., and the necessary implication is that they, as agents of the company, shall be bound to perform all its other obligations whether incurred by it prior to the appointment of the Trustees or, after that, through the Trustees themselves. Besides, all legal and equitable remedies remain unchanged. The act does not in any way affect the right to bring proceedings at law or in equity against the corporation itself nor is there any provision undertaking to exempt the Trustees, as such, from the ordinary processes of law. In fact, the last section of the act expressly contemplates the possibility of legal proceedings for the enforcement of obligations incurred prior to their appointment, thus:—

> "But if during said period of management and operation the Trustees shall be deprived of the possession or control of said property by reason of any action to enforce any deed, claim or obligation which existed at the time the Trustees took possession, the Commonwealth shall be under no obligation to pay any sum or sums under this act to meet any deficiency in income accruing while the Trustees are deprived of such possession and control" (Section 18).

The plaintiff's theory appears to be that, even though the obligations of the respective contracts may not be impaired directly, or in terms, yet they are in some indirect way impaired by the taxes provided for by the act.

But it is elementary that no contract between a State

and an individual or corporation can prevent the State from imposing taxes otherwise lawful, unless such contract expressly provides for an exemption of the individual or corporation, or his or its specific property, from taxation.

Providence Bank v. *Billings,* 4 Peters, 514. (Opinion of Mr. Chief Justice Marshall, page 559.)
Vermont R.R. Co. v. *Vermont Central R.R. Co.,* 63 Vt. 1.

So also contracts between individuals cannot prevent the taxation of such individuals upon the proceeds of such contracts because, as stated by Mr. Justice Daniel in *West River Bridge Co.* v. *Brattleboro et al.,* 6 Howard, 507, at page 545:—

> "But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."

The fact that the proceeds of the tax which the City, as an agency of the government, is required to collect are used to make up the deficiencies in the operating expenses of the Trustees of the Boston Elevated Railway Company does not in any way cut down the obligation of the Boston Elevated Railway Company to the plaintiff to pay a rental, or do other acts, nor does it interfere with the City in

applying the proceeds of its rentals to the purposes authorized by existing statutes. This contention of the plaintiff would, if followed to its logical conclusion, prevent the Commonwealth from imposing taxes upon any property belonging to an individual who owns a state bond, if the proceeds of the tax were to be devoted in part to paying interest on the bond. The right of the State to impose taxes for this and other purposes certainly cannot be so limited, but on the other hand might be extended to include in the taxable property of the Commonwealth the subways themselves, as a part of the property of the City of Boston not used for governmental purposes, inasmuch as the City's ownership thereof, "in its private or proprietary capacity," does not differ in character from the ownership of structures in the streets by any public service corporation.

In *Sears* v. *Crocker*, 184 Mass. 586, this court said with reference to Section 19, Chapter 534, Acts of Massachusetts of 1902,—

> "It leaves the subways lawfully resting in the public streets by virtue of the rights of the public therein, and it gives the city the same kind of ownership of the structures that gas companies and electric lighting companies have in their pipes and conduits, except that the city is charged with certain special trusts in the ownership of these subways."

See, also, *Covington* v. *Kentucky*, 173 U. S. 231.

The proceeds of this tax, collected by the City from property taxable by it, and then paid to the Commonwealth, are in fact put, with the operating income of the Boston Elevated Railway Company, into a fund from which the operating expenses, including the rentals and expenses of repairing and maintaining the subways, are paid, but this is in no sense a violation of, or an impairment of, any of the obligations of the contracts.

To take away from a person, by means of a tax, a part of the money paid over to him by another, under the terms of a contract with that other, is not to impair the obligation of that contract.

The argument upon this point presented in behalf of the city in its brief, pages 55–62, seems to be founded upon the assumption that such part of the tax to make up the deficit as is paid by the city is a tax of some proportionate part of the subway rentals. This assumption is entirely unwarranted. The State Treasurer does not make demand upon the city for subway rentals or for any part of them. The demand for the tax made by the State Treasurer is entirely unconnected with, and irrespective of, the ownership of the subways by the city. Thirty per cent of this tax is levied upon cities and towns which own no subway. Can the tax then be valid as to them and not as to the City of Boston? Apparently, the City concedes that the tax would be valid as to it if it owned no subways, but argues that, inasmuch as it owns subways and receives rentals from them, the deficit in some strange manner results in a tax upon, and a taking of, those subway rentals. It would be as logical to argue that, if a city issues bonds to pay for the purchase of a site for a city hall and then levies a tax to pay the interest on the bonds, it is thereby depriving of his property a former owner of the site who happens to own seventy per cent of the assessed property in the city and, consequently, pays seventy per cent of the entire taxes.

Counsel for the City ask (Brief, p. 59) what inducement there would have been for the City to borrow $31,000,000 for subway construction if the State can take over the leases, operate the company as it sees fit and then collect seventy per cent of the resulting deficit from the city by

means of a tax. We might reply by asking what inducement there would have been for a man to invest heavily in real estate in a city if he had known that the taxes would be doubled in the next year. That he would not have invested if he had known this cannot make the additional tax invalid, or result in depriving him of his property without due process of law. The additional tax may amount to more than his entire income from the real estate he has bought, and from all other sources, for that matter, but that does not make it unconstitutional.

The argument that the City would not have built the subways if it had known what the future would bring forth is no more than a statement that it did not expect what has now happened. If it made an improvident bargain, it cannot now abrogate that bargain by asserting that, if it had known what it now knows, "the acts would not have been accepted," or that "the city is left with an enormous debt, which would never have been incurred if any such results as these could have been foreseen."

The fundamental fallacy underlying this argument of the City is in the premise that the tax is a specific taking of a particular revenue—the subway rentals. Obviously, it is nothing of the sort.

An attempt is made (Plaintiff's Brief, p. 58) to establish that if two cities in the taxing district pay the same tax,—$500,000 each,—only one of them owning a subway, the position of the city which owns a subway is the worse of the two. This loses sight of the fact that the city which owns the subway is receiving an income from it which the other city does not receive. If the subway-owning city receives $500,000 a year from subway rentals and pays out the same amount for interest on the subway bonds, and, in addition, pays $500,000 for taxes, it is no better off and no worse off than the other city which also pays $500,000 in taxes. The best answer, however, to this argument is, that whether one of the cities is better off than the other

or not is an absolutely immaterial fact. That fact could not make the tax unconstitutional.

It is thoroughly established that "the construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text."

Leffingwell v. *Warren*, 2 Black, 599.
Morley v. *Lake Shore & Michigan Southern Railway Co.*, 146 U. S. 162.
Tullis v. *Lake Erie & Western Railroad Co.*, 175 U. S. 348.

In *Tullis* v. *Lake Erie & Western Railroad Co.*, *supra*, the court had under consideration a statute enacted by the legislature of Indiana, which the highest court of Indiana had construed in such a way as to hold it constitutional. It was urged that the construction placed upon this act by the Indiana court was wrong. Mr. Chief Justice Fuller, delivering the opinion of the court, said with respect to this particular point:—

> "As remarked in *Missouri, K. & T. R. Co.* v. *McCann*, 174 U. S. 580, 586, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort, and by an adverse construction to decide that the state law is repugnant to the Constitution of the United States. 'But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.'"

III. The Act does not deprive the City, or its Taxpayers, of Property without Due Process of Law

The short answer, and a complete answer, to the plaintiff's contention that the act takes the property of the City, or of its taxpayers, without compensation, or without due process of law, is that *no property, of either the City or its taxpayers, is taken at all,* either in that way or in any other. As has already been pointed out above, the only property taken, if any, is the property *of the Boston Elevated Railway Company.* The title to the subways, and the right to the rents from them, remain, as before, in the city of Boston.

The Board of Trustees is to "manage and operate" "the Boston Elevated Railway Company . . . and the properties owned, leased or operated by it." The subways are not, of course, owned by that company, it has leasehold interests only in them, and it is of those leaseholds only that the act gives the Trustees possession. The results of any other interpretation of the act would be absurd. If the act constituted a "taking" of the title to the physical properties in which the company has a leasehold interest, which it leases for terms of years, then the different buildings in various cities and towns which it leases for use as waiting-rooms, two entire floors of the large business building in Boston, which it leases for its general offices, and all the property of the two or three other street railway companies which it leases and operates, would have been "taken," as well as the subways, and the owners of all those properties would have been deprived of their properties without compensation of any kind,—an absurd conclusion. The leasehold interests of the company, at most, are taken, and no more, and these cannot, of course, be taken for longer than the terms of their existence. A lease cannot be taken for longer than the period of its unexpired term, a ten-year lease cannot be taken for more than ten years. The ownership of the reversion remains in each case undisturbed and unaffected.

In any event the act provides merely that the Trustees "shall take and have possession of said properties." That does not mean "shall take the *title* to, and have the possession of," but does mean only "shall take, and have, possession of." The true interpretation is as if the language were, "shall take possession of and shall have possession of." It was needless, however, to employ the words "shall" and "possession" twice in close succession. The word "take" is not used in the technical sense of "expropriate" or "acquire title to." According to the true grammatical construction of the sentence the object of the verb "take" is the noun "possession," not the words "said properties."

If "take" had been intended to mean "take the title" or "acquire the ownership," it would have been quite unnecessary to add anything about the possession of the property, since the right of possession would follow the ownership, as of course.

Moreover, Section 13 provides that,—

> "If the period of public management and operation expires, *control of the property* shall then revert to the company."

This provision plainly recognizes that it is the "control" of the property only, not its ownership, which has been taken from the company.

Even if the act did take property of the city without due compensation that feature of the legislation is readily separable from the rest, and would not invalidate the plan of public operation and control, or the contract to make deficiencies good.

Here, again, the construction given to the statute by the highest judicial tribunal of the State "is as binding upon the courts of the United States as the text."

See cases cited, *supra*.

What is said under II (b), page 16, *supra*, with reference to the assumption in the argument of the City that the tax upon the City is a tax upon, or of, a part of the subway rentals applies also here. That tax is in no sense a taking of any part of the subway rentals, and its validity or constitutionality cannot be in any way affected by the fact that these rentals are paid, or are payable, to the City.

IV. The Act does not provide for "an Arbitrary and Unreasonable Delegation of Legislative Authority"

To vest in a Board of Trustees, appointed by the Governor, power to manage the system of local public transportation in Boston and its suburbs, and to determine the cost of the service given, including in that cost the amount of proper charges for maintenance and depreciation of the property of the Boston Elevated Railway Company used as a part of that system, is a proper and lawful delegation of legislative power.

The plaintiff's contention upon this subject is conclusively answered by the legislative history of the last forty years, which includes the establishment and powers of the numerous boards of Railroad Commissioners, Gas and Electric Light Commissioners and of Highway and Park Commissioners, to say nothing of the national Interstate Commerce Commission and the Public Service Commissions of most of the States.

Legislatures may delegate, and have always delegated, to municipalities and officials of various kinds, County Commissioners, Highway Commissioners, Selectmen, and others, the exercise of certain of their own powers, more particularly those of an administrative character.

It is the general, almost the universal, custom for the route and construction of public ways to be determined by subordinate officials, such as County Commissioners, Highway Commissioners or Road Commissioners, to whom the legislature has delegated the power to do this, and such has been the custom from time immemorial. For the legislature itself to determine such questions would be an unusual and an extraordinary course.

Brodbine v. *Revere*, 182 Mass. 598.

The legislature authorized the Metropolitan Park Commission to "make rules and regulations for the government and use of the roadways and boulevards under its care," etc., and the constitutionality of such a delegation of power was denied. Knowlton, C. J., discusses at length an exception to the general rule that the legislature of a State cannot delegate the general law-making power conferred upon it by the constitution of the State, and holds that the statute in question is not unconstitutional, on the ground that the determination of such matters as are left to the commissioners are properly within the exercise of the right of local self-government which the legislature may commit to a city or town, and that, when the State took the public parks, it succeeded to the rights of the local communities in which the parks were situated, and may exercise those rights through its board of officers in much the same way as they were exercised before by the local cities or towns.

On page 602 the Chief Justice says,—

> "There is also strong ground for the contention that the quoted language of the statute simply leaves to the board the administration of details which the legislature cannot well determine for itself and which it may therefore leave to the determination of a subordinate tribunal."

Again, speaking of the validity of the rules and regulations of local boards of health, the Chief Justice says on page 601,—

> "Perhaps some of these statutes may also be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which

prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties."

Lynn v. *County Commissioners,* 148 Mass. 148.

The legislature provided by statute that, if three or more towns so require, the County Commissioners shall establish truant schools, and it was objected that this was a delegation of legislative power. The commission had power to select sites for schools and to make regulations, etc., for their management.

Knowlton, J., says on page 151:—

"It is not unconstitutional as a delegation of legislative power. It is complete in itself. It is as if the Legislature had said, 'The county commissioners shall establish and maintain a county truant school in every county where there is a public exigency for one and the requirement of three or more towns in a county shall be conclusive proof of the existence of such an exigency.' This method of determining whether the law shall be set in motion in a given case is merely a detail of administration, for which the Legislature may provide in this way, without delegating the power to make laws."

Opinion of the Justices, 138 Mass. 601.

The legislature desired to appoint civil service commissioners who should have power to make rules to determine the qualifications of government officers and to supervise the administration of such rules and by order referred the question of the legality thereof to the Justices.

The Justices, on page 603, say:—

"We think the Legislature has the constitutional right to provide for the appointment of such commissioners and to delegate to them the power to make rules, not inconsistent with existing laws, to guide

and control their discretion and the discretion of the officers of the state or of the cities in whom the appointing power is vested. This is not a delegation of the power to enact laws; it is merely a delegation of administrative powers and duties, and there is no provision of the Constitution which prevents the Legislature from enacting that such rules when duly made shall be binding upon the officers and citizens to whom they apply, and that they may be enforced by suitable penalties," etc.

Commonwealth v. *Essex County,* 13 Gray, 239.

The defendant company was authorized by statute to build a dam across the Merrimac River, and maintain in the dam a fishway such as the County Commissioners should approve. The question was raised whether the legislature could properly delegate to the commission the power to determine where and how this fishway should be built.

The court, in speaking of such legislative enactment and provisions for commissions, says on page 250,—

> "We believe it has been usual, in such acts of legislation, to delegate an authority to a committee or commissioners, to see that certain provisions are specifically carried into effect, and we have never known the legality of such delegation of power questioned."

People v. *Dunn,* 80 Cal. 211.

The legislature by statute provided that a board of commissioners should select the site of a certain public building, and the question arose as to whether this was an improper delegation of legislative power.

Held, that the statute was not unconstitutional, the court, on page 214, saying,—

> "To hold that such a power could not be vested in persons named in the act would be an unreasonably

strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act."

See, also, Am. & Eng. Encyc. of Law, 2d ed., vol. 6, pp. 1021, 1029 and 1030.

CONSTITUTIONAL LAW—THE LEGISLATURE

Page 1021: "It is a doctrine frequently reiterated by the courts that the functions of the legislature must be exercised by it alone and cannot be delegated. This, however, is true only in a qualified sense and the qualifications are rapidly becoming larger."

"A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies: to boards and commissions, to local authorities and especially to the voters."

Page 1029: "There is no constitutional reason why legislative functions which are merely administrative or executive in their character should not be delegated by that branch of the government to other departments or to bodies created by it for that purpose. A distinction is drawn between a delegation of power to make the law, involving necessarily a discretion as to what it shall be and a grant of authority relative to its execution, though the latter involves the exercise of discretion under and in pursuance of the law."

The general powers of management and administration conferred by this act upon the Trustees are well within the principle established by these authorities.

If further authority be needed to establish the right of the legislature to vest in them the power to determine the "cost of service," and to fix the amount of some of the charges—such as maintenance and depreciation—which are elements of it, and to exercise discretion in so doing, such authority is found in the long line of Massachusetts

decisions holding that the legislature has power to delegate to such boards or commissions power to determine or assess damages and to apportion expenses among counties, districts or municipalities.

Hingham & Quincy Bridge & Turnpike Corporation v. *County of Norfolk,* 6 Allen, 353 (1863).

By Chapter 177, Acts of 1862, the road belonging to the petitioner was made a highway, and a commission was appointed by the court to determine the amount to be paid as damages and apportion it. The commission found the damages to be $16,000, and decreed that the County of Norfolk should pay three-quarters and the County of Plymouth one-quarter.

> Page 360: "The views already expressed are decisive of all the other objections urged in behalf of the county of Norfolk against the validity of the act. The legislature having the power to determine that the county should bear a proportion of the expense of establishing the turnpike as a highway, and having exercised this power, it was competent for them to delegate to commissioners the authority to determine the share or amount of the whole expense which should be paid by the county. *Boston Water Power Co.* v. *Boston & Worcester Railroad,* 23 Pick, 360, 396. The mode in which the power was delegated was certainly wisely adapted to secure an intelligent and impartial tribunal."

Scituate v. *Weymouth,* 108 Mass. 128.

Chapter 177, Acts of 1862, laid out certain turnpikes and bridges as a public highway and provided for the appointment of commissioners to determine the damages and apportion the cost.

By Chapter 265 of 1870 this act was amended, provision being made for a new commission appointed by the Gov-

ernor and Council to apportion the expenses incurred in the maintenance and repair of the bridges mentioned in this act.

Page 130: "It is too well settled to be disputed, that it is within the constitutional power of the legislature to make laws for the construction, support and maintenance of roads and bridges, and for the distribution among the counties and towns of the burdens of maintaining them; and this power may be exercised by the legislature, in its discretion, either by general or special laws. It is clear, also, that it is competent for the legislature to delegate to commissioners the authority to determine the amount or share of these burdens which shall be borne by the several counties or towns. *Salem Turnpike and Chelsea Bridge Co.* v. *Essex,* 100 Mass. 282. *Hingham & Quincy Bridge & Turnpike Co.* v. *Norfolk,* 6 Allen, 353. *Attorney General* v. *Cambridge,* 16 Gray, 247. *Harwich* v. *County Commissioners,* 13 Pick. 60. In the exercise of this power the legislature passed the St. of 1862, c. 177, under which the town of Weymouth now claims, and which has been held by the court to be constitutional and valid. *Hingham & Quincy Bridge & Turnpike Co.* v. *Norfolk,* 6 Allen, 353. That statute, so far as regards the maintenance of the bridges, was not in any sense a contract with the towns affected by it. It was an exercise of the authority of the legislature to distribute public burdens and duties. It is clear that under the same constitutional power, it had the right to change the law and redistribute these public burdens, if from a change of circumstances or other reasons it deemed it just and proper so to do. *Cambridge* v. *Lexington,* 17 Pick. 222. *Attorney General* v. *Cambridge,* 16 Gray, 247."

Brayton v. *Fall River,* 124 Mass. 95 (1878).

Commissioners were appointed by the court under Chapter 295, Acts of 1872, which authorized the Old Colony & Newport Railway Company to construct a highway and railway bridge over the Taunton River. This act directed

the commissioners to determine the equitable cost of the bridge and apportion one-quarter of it among the county, cities and towns especially benefited, and directed that this one-quarter should be paid to the railroad company. The commissioners determined the sum of $76,361.20 to be one-quarter of the equitable cost and made an apportionment of it as between various cities and towns.

Page 96: "The act in question gives to the railroad corporation the right to build a bridge, adapted for both kinds of travel, upon a plan to be approved by the railroad commissioners, and with a draw approved by the harbor commissioners, and directs that one fourth of the 'equitable cost' of the same be paid by the county to the corporation, and that, on the completion of the bridge, that portion thereof adapted to highway purposes shall thereupon become a public highway.

"The objection that this act is unconstitutional cannot be sustained. From the earliest times, laws have been passed providing for the construction, support and maintenance of public roads and bridges, and for the distribution of the expense and burden of the same upon the cities and towns benefited. It is said that such laws are authorized by those clauses of the Constitution which give to the Legislature the right to impose taxes, and the power to enact such wholesome and reasonable laws, as they shall judge to be for the good and welfare of the Commonwealth. The manner in which this power shall be exercised, and the means and instrumentalities to be employed, are largely within the discretion of the Legislature. It belongs exclusively to that body to determine whether the benefit to be secured in any given case is sufficient to warrant the cost, and this is not a question for the court. The Legislature may itself determine in the first instance the question of public necessity and convenience, or may leave it to the adjudication of designated officers and tribunals. The power is most commonly and extensively exercised in the mode prescribed by general laws, administered by established tribunals or boards of public officers; but

in many cases the end is accomplished by special legislation; with or without the aid of commissioners. In all cases, however, the work of actual construction has been committed to private citizens, or to corporate bodies, public or private; the power to exercise the right of eminent domain may even be so delegated. *Dorgan* v. *Boston*, 12 Allen, 223. *Hingham & Quincy Bridge* v. *Norfolk*, cited above. *Salem Turnpike* v. *Essex*, 100 Mass. 282. *Haverhill Bridge Proprietors* v. *County Commissioners*, 103 Mass. 120. *Eastern Railroad* v. *Boston & Maine Railroad*, 111 Mass. 125. *Northampton Bridge Case*, 116 Mass. 442."

For clear and exhaustive discussions of these general principles of law, accompanied by full citations of the authorities, see the opinions in:—

Kingman, Pet'r, 153 Mass. 566, 576, 577.
W. B. de las Casas, Pet'r, 178 Mass. 213.
Brown v. *Boston & Maine R.R.*, 233 Mass. 502.

It is the established doctrine of this court that such administrative powers may be thus delegated.

Field v. *Clark*, 143 U. S. 649.
United States v. *Grimaud*, 220 U. S. 506, and cases therein collected.
United States v. *Antikamnia Chemical Co.*, 231 U. S. 654.
Plymouth Coal Co. v. *Commonwealth of Pennsylvania*, 232 U. S. 531, 542, 543.
Utah Power & Light Co. v. *United States*, 243 U. S. 389, 410.
Maryland Casualty Co. v. *United States*, 251 U. S. 342, 349.

For the Trustees to determine in their discretion the amount to be allowed for depreciation does not differ in substance from their determining the amount to be ex-

pended for repairs. The two charges are of the same general nature, and the exercise of discretion is in both cases for the same general purpose,—to keep the property in good operating condition.

That the legislature should be required itself to determine such details of street railway accounting as the precise amount of proper annual charges for maintenance and depreciation would be no less than extraordinary, and in fact probably quite impracticable.

This bill does allege that the charges fixed by the Trustees for depreciation and maintenance are "excessive, unreasonable, illegal and unnecessary," but the answer to that is that the legislature has left the amount of them entirely to the discretion of these officers, the exercise of which is conclusive, unless perhaps, if tainted with fraud or bad faith, which is not alleged. On the contrary, the bill alleges in so many words that "the trustees felt it incumbent upon themselves in the performance of their duties" to make these charges.

See, *Mayor and Aldermen of Springfield, Petitioners*, 234 Mass. 578.

The general right of the legislature to apportion the amounts advanced by the Commonwealth among the different municipalities as taxes can scarcely be questioned. It is conclusively established by the authorities cited above.

See, also, *Opinion of the Justices*, 231 Mass. 603, which contains this language, at pages 613, 614:—

> "The right to apportion the public burdens among different, separate divisions of the State can hardly be questioned. *Hingham & Quincy Bridge & Turnpike Corp.* v. *County of Norfolk*, 6 Allen, 353. Although it has been the custom of the General Court to submit such legislation to the acceptance of the municipalities to whose taxes resort must be had for the money required, that has always been done nor

is it necessary under the Constitution. The power of the legislature is paramount in this particular."

See, particularly,—

Hingham & Quincy Bridge & Turnpike Corp'n, v. *County of Norfolk,* 6 Allen, 353.

Scituate v. *Weymouth,* 108 Mass. 128.

V. The Act does not deprive the Plaintiff of the "Equal Protection of the Laws"

It is not necessary that the expense of operating this system of local transportation should be distributed over the entire Commonwealth of Massachusetts, or that it should be distributed equally among the municipalities within the particular district to which the legislature assigns the burden of meeting the deficiency, in order to comply with the requirement that the plaintiff shall not be deprived of the equal protection of the laws. It is well established that nothing in the Constitution of the Commonwealth of Massachusetts, or in the Constitution of the United States, prevents the legislature from creating districts for the purpose of meeting the expenses of local improvements, so long as such districts be not arbitrarily created. Nor is it necessary that the rate of taxation be the same throughout the district. So long as there is a reasonable principle underlying the distribution of the taxes within the district there is no denial of the equal protection of the laws.

Kingman, Pet'r, 153 Mass. 567.
Missouri v. *Lewis,* 101 U. S. 22.
Willoughby, Constitutional Law, page 384.

The apportionment of the taxes as between the cities and towns according to the rule prescribed in this act is an adequate compliance with the requirements of the Constitution, being, as it is, a reasonable, and not an arbitrary, basis for distribution.

Kingman, Pet'r, 156 Mass. 361.
County of Mobile v. *Kimball,* 102 U. S. 691.
Williams v. *Eggleston,* 170 U. S. 304.
Houck v. *Little River District,* 239 U. S. 254.
Miller & Lux, Inc. v. *Sacramento Drainage District,* 256 U. S. 129.

In conclusion it is submitted with confidence:—

I. That legislation of this scope and purpose was well within the power of the Legislature of Massachusetts.

II. That this act does not impair, or affect, the obligation of any contract to which the City of Boston is a party.

III. That it does not deprive, or purport to deprive, the City of any property.

IV. That it delegates to the Trustees no power which the Legislature had not the right thus to delegate.

V. That it imposes upon the City no tax which the Legislature had not the right to impose upon it.

GASTON, SNOW, SALTONSTALL & HUNT
Attorneys for
Boston Elevated Railway Company

Alexander Britton,
Thomas Hunt,
of Counsel.